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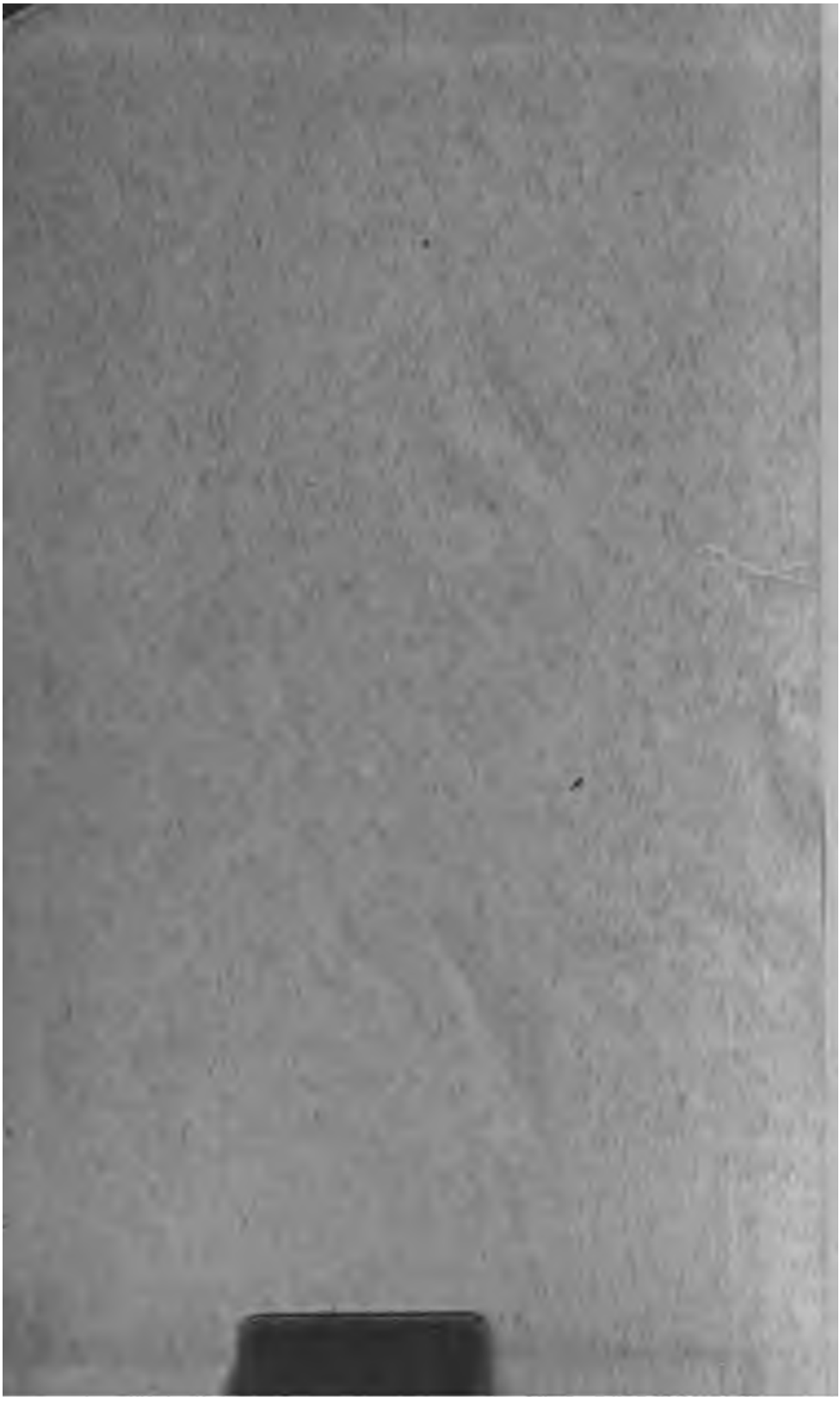
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The Law of

Loss and Damage Claims

Including the Cummins Amendment, Bill of Lading Act, Twenty-Eight Hour Law, and Federal Control Act

Second Edition

By HERBERT C. LUST
of the Chicago Bar

Author, Digest, Supplemental, and Quarterly Digest of Decisions Under the Interstate Commerce Act; The Workmen's Compensation Act of Illinois, Annotated; The Act to Regulate Commerce, Annotated, The Loss and Damage Review, Etc.

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BY
HERBERT C. LUST

To

CHIEF JUSTICE HARRY OLSON

of the Municipal Court of Chicago

this work is inscribed

PREFACE TO THE SECOND EDITION

It is now three years since the first edition of this work was published. Litigation concerning loss and damage claims has materially increased since then. The author has been greatly perplexed with the problem presented of covering the field thoroughly and at the same time keeping the size of this book down so that by its very appearance it would not frighten the layman. As in the case of the first edition, this work is prepared primarily for the use of traffic managers. It is not intended primarily as a law book for the use of the lawyer, although as will be seen by referring to the number of cases cited, it will be found well adapted for the use of any lawyer.

Mr. Moore, in his excellent work on the subject of Carriers, makes a pertinent observation in his preface that has always made a deep impression upon me. He says: "That writer does the most who gives his reader the most knowledge and takes from him the least time."

That thought has been paramount in the preparation of this work. Interstate shipments are now governed solely by the federal law. When, therefore, a principle has been settled by a decision of the Supreme Court of the United States, that fact has been noted and the citation given, but it has not been deemed necessary to notice *ad infinitum* a large quantity of state decisions that may have discussed the same proposition.

It is believed that this work will be found complete in discussing all principles that have been decided in the adjudication of loss and damage claims. All decisions, both federal and state, have been examined, and such principles as it has been thought will be sustained by the federal courts will be found to be fully explained. Where there are divergent views on the same proposition, and it is doubtful which line of authorities will be followed by the federal courts, the author has given both views.

Particular attention has been paid to obscure points, on which there are very few decisions, which nevertheless arise very frequently in the settlement of claims. Such matters as concealed loss, freezing, bad order notations on freight bills as constituting notice of loss, and the like, are questions on which there are not many decisions. It is very difficult, even in the encyclopaedias, to find cases on these points. These propositions, however, although they very rarely come up in the courts, are an every-day problem to the busy traffic department. Therefore, the author has endeavored to correllate all the cases on points such as these, so that this work will be of a real assistance, not only in the determination of the more important questions, but of all questions on which any legal opinion can be definitely formulated.

While care has been taken to support the various principles with citations of cases, they are intended to be illustrative rather than exhaustive. The classification used is the same as in the first edition. This follows the course that the shipment naturally takes. Thus, liability of the carrier when it first receives the shipment, liability during transit, and liability after arrival, seem to be the natural method of treating the subject.

In the appendix will be found printed the federal laws by which Congress has occupied the field of loss and damage claims, namely, the second Cummins Amendment, the Twenty-eight Hour Law, and the Bill of Lading Act. Such portions of the Federal Control Act as are pertinent are also printed. This volume, as the first edition, will be kept down to date by quarterly supplements, known as the LOSS AND DAMAGE REVIEW. These coming out every three months, will constitute a current quarterly textbook of the law.

HERBERT C. LUST.

Chicago, Ill., 1919.

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THE LAW OF LOSS AND DAMAGE CLAIMS

(2nd edition)

I

CONTROL AND REGULATION OF CARRIERS.

1. **Federal Legislation.**
 —The Cummins Amendment.
2. **State Regulation.**
3. **Determination of Status.**
 —Who Are Common Carriers.
4. **What Is an Interstate Shipment.**
5. **What Law Governs the Validity and Interpretation of the Contract of Shipment.**

1. **Federal Legislation.** The first attempt by Congress to assume any jurisdiction over interstate railroads was with the passage of the Interstate Commerce Act in 1885, but this law only dealt with the regulation of the rates and practices of carriers, and did not affect their liability with reference to loss and damage claims for injuries to freight shipments. This situation continued until 1906, when a radical step was taken. In that year the so-called Carmack Amendment was incorporated in the Hepburn bill. The purpose of this law was to secure unity of liability between the various carriers of the country as it did unity of transportation. It provided that the initial carrier should be liable for all injuries to a shipment no matter where the damage occurred. Thus if a shipment was injured on the line of the delivering carrier the initial carrier was liable, no matter how many subsequent carriers afterwards handled the shipment.[1] This law proved to be merely the corridor through which Congress entered the entire domain of interstate commerce, and enacted legislation which covered every phase of the subject. Finding that the Carmack Amendment did not completely cover all the points that habitually arose, Congress passed in 1915 the

1. Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 200; 55 L. ed. 167; 31 Sup. Ct. 164.

Cummins Amendment, which invalidated all agreements concerning the measure of damages to be applied with respect to loss and damage claims, in 1916, the Bill of Lading Act which defined the rights of a claimant under the bill of lading, and finally, in 1917, amended the Cummins Amendment to provide that limitations of liability were valid only when expressly authorized by the Interstate Commerce Commission. With this legislation Congress has completely occupied the field of law governing interstate shipments. All rights and liabilities growing out of an interstate shipment, therefore, are to be adjudged solely with respect to the federal law.[2] In this connection it

2. Adams Express Co. v. Croninger, 33 Sup. Ct. 148, 226 U. S. 491; 57 L. ed. 314.

Pierce Co. v. Wells Fargo & Co., 236 U. S. 278. Also see M. K. & T. Ry. v. Sealy, 39 Sup. Ct. 97.

Where a petition in an action for damages for a railroad company's failure to comply with a stop-over provision in a contract for an interstate shipment of live stock showed that the subject matter of the cause of action was the breach of an interstate contract, the fact that the plaintiff deemed his action arose under the state laws will not preclude recovery under the federal laws, which have entirely superseded the state laws; there being no variance between the petition and proof. Conley v. Chicago, B. & Q. R. Co., (Mo. 1916), 183 S. W. 1111.

A state may exercise power over the general subject of commerce where the power of the state is exclusive, and where the state may act in the absence of federal legislation, but where the subject is national in character the action of Congress is exclusive; the state cannot interfere at all. Blalock Hardware Co. v. Seaboard Air Line Ry. Co., (N. C. 1915), 86 S. E. 1025.

A question as to the carrier's responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of principles under the common law. Southern R. Co. v. Prescott, 36 Sup. Ct. 469, 473; 240 U. S. 632; 60 L. Ed.—

It applies to such so-called special contracts as live stock contracts, as well as other agreements for interstate transportation. Armstrong v. I. C. R. R. (Ky. 1915), 172 S. W. 947, 948. Hunt v. S. & L. I. M. & S. Ry. (Mo. 1915), 173 S. W. 61, 62.

Southern Ry. v. Prescott, 240 U. S. 642; 60 Ed. L. ed. —, 36 Sup. Ct. 469.

This statute therefore superseded not only all state legislation but even provisions of state constitutions. Adams Exp. Co. v. Cook (Ky. 1915), 172 S. W. 1097.

It may be noted here the state courts hold the validity of a contract for an interstate shipment may be determined by either a state or a federal court, but only with reference to the Interstate Commerce Act as construed by the federal courts. K. C. & M. Ry. Co. v. Oakley (Ark.),

should be born in mind that under the second Cummins Amendment limitations of liability are not valid unless **expressly approved** by the Interstate Commission. The mere filing of a released rate by a carrier does not render it valid. The Commission must expressly authorize it. This subject will be discussed in detail in considering the effect of released rates in Chapter VIII.

170 S. W. 565, 566; Adams Express Co. v. Cook (Ky. 1915), 172 S. W. 1097; Dunlap v. Chicago & A. Ry. Co. (Mo. 1915), 172 S. W. 1178; Lynch v. N. Y. C. & H. R. R. Co., 153 N. Y. S. 633, 636.

However, the Carmack Amendment does not invalidate an oral contract for the shipment of live stock. Gulf C. & S. Ry. v. Vasbinder (Tex. 1915), 172 S. W. 763, 765.

For a considerable time it was thought that Congress had not assumed its entire jurisdiction over interstate commerce, and that the states, in spite of the passage of the Cummins Amendment and other provisions of the Interstate Commerce Act, could still legislate on matters which, while indirectly affecting interstate commerce, would nevertheless not unduly burden it. The silence of Congress upon the subjects of commerce over which it has jurisdiction which require uniform regulation is equivalent to affirmative legislation that such subjects should be free from state enactments. Western Union Tel. Co. v. Lee (Ky. 1917), 192 S. W. 70.

And legislation which is a mere aid to interstate commerce may be enacted by a State, although it may incidentally affect that commerce. Western Union Tel. Co. v. Lee (Ky. 1917), *Supra.*

So where Congress has not assumed jurisdiction over a given subject of commerce, but may do so, in the absence of congressional action, the state may exercise its police power over the subject. Western Union Tel. Co. v. Lee, *Supra.*

However, the enactment of a federal statute removes its subject-matter from the sphere of state action, so that in actions in state courts under such statutes, while questions of procedure and evidence are determined by the laws of the forum, questions inseparably connected with the right of action must be settled according to federal law. Continental Paper Bag Co. v. M. C. R. R. (Me. 1916), 90 Atl. 259.

Congress, however, has assumed complete jurisdiction over loss and damage claims and, therefore, in determining the liability of a carrier for loss of or injuries to freight, such liability must be determined solely with respect to the federal statutes and the federal decisions. Harlesen v. St. L. & S. F. R. R. (Mo. 1917), 191 S. W. 1068; A. T. & S. F. Ry. v. Miller (Colo. 1917), 163 Pac. 840.

So the decision of the United States Supreme Court construing the Carmack Amendment to apply to damages caused by delay in transportation is controlling on the state courts. Gulf C. & S. F. Ry. v. Nelsen (Tex. 1917), 192 S. W. 1056.

. —**The Cummins Amendment.** The Carmack Amendment was amended by the Cummins Amendment, effective June 2, 1915. This statute superseded all the previous state decisions on limitations of liability. The Cummins Amendment rendered void the provisions theretofore carried in the bills of lading providing for the giving of notice and the filing of claims within a specified period. Most of the bills of lading had pro-

The rights and liabilities of an interstate passenger and the carrier in case of a loss of baggage depend upon Federal legislation, the agreement between the parties and common-law principles, as accepted and enforced in Federal tribunals. N. Y. C. & H. Ry. v. Beaham, 37 Sup. Ct. 43.

In case of an interstate shipment of cattle the construction of the bill of lading, being the contract between the parties, is a federal question, and the construction placed thereupon by the federal courts is controlling. B. & O. Ry. v. Leach (Ky. 1917), 191 S. W. 310.

So the federal decisions that where alternate rates fairly based upon valuation are offered ,a railroad may limit its liability by special contract, control. Pierce Co. v. Wells Fargo Co., 236 U. S. 278, 283; 35 Sup. Ct. 351, 39 L. ed. 576, 581; L. & N. R. R. v. Montgomery (Tenn.), 188 S. W. 1146; L. & N. R. R. v. Hobbs (Tenn. 1916), 190 S. W. 461.

So a state statute making a bill of lading, acquired in good faith and for value, conclusive that the carrier issuing the same received the goods therein specified for transportation has no application and no effect where the liability of the common carrier arises out of the issuance of an interstate bill of lading. Lerntz v. C. St. P. M. & O. Ry. (Minn. 1917), 161 N. W. 411.

The holdings of the state courts that injuries received before the voyage began do not fall under the term "transportation" or the contract of shipment are not controlling in the case of an interstate shipment, in view of Interstate Commerce Act, § 1, including everything from an order for cars to final delivery under the term "transportation." C. R. I. & P. Ry. v. Whaley (Tex. 1917), 190 S. W. 833.

The allowance of an attorney's fee in the action to recover a loss and for which provision is made in a state statute is unwarranted and invalid. Andrews v. U. P. Ry. (Kans. 1916), 161 Pac. 600.

However, a state may legislate with respect to intrastate traffic, that is, traffic which originates within and ends within the state, not passing enroute through any other state.

Kirby's Dig. § 6621, providing that in any action against a railroad for violation of a law regulating transportation, the successful plaintiff shall recover a reasonable attorney's fee, to be taxed as costs, applies to an action for the penalty provided by Acts 1907, p. 456, § 2, for failure to forward freight at the speed thereby provided. C. R. I. & P. Ry. Co. v. Consumers' Coal Co. (Ark. 1917), 193 S. W. 93.

vided that notice of loss had to be given within a specified time. In bills of lading governing live stock shipments, for instance, many of the carriers had provisions that notice of loss or damage had to be given in one day. Under the Cummins Amendment the shipper is given 90 days within which to give notice of loss, 4 months within which to file a claim, and 2 years within which to bring suit. It furthermore provides that if the loss,

The provision of Acts 1907, p. 456, § 2, as to distance per day a railroad must carry forward freight, allowing 24 hours "at each point where transferring from one railroad to another or rehandling of freight is involved," applies to a shipment in less quantity, at a division point, where the car is transferred from the train in which it arrives to another. C. R. I. & P. Ry. Co. v. Consumers' Coal Co. (Ark. 1917), 193 S. W. 93.

Acts 1907, p. 456, § 2, declaring that a railroad not transporting shipments in the time thereby prescribed shall forfeit and pay "to the shipper" a certain amount per day on demand "by the shipper, or other party whose interest is affected by such delay," gives the penalty and cause of action therefor to the person whose interest suffers from the delay, and so in case of a shipment of goods sold f. o. b. to the buyer to whom they are consigned; there being a delivery to him so far as the seller is concerned, and title passing to him, on acceptance by the carrier of the goods for transportation, and his interest alone being affected by the delay. C. R. I. & P. Ry. Co. v. Consumers' Coal Co. (Ark. 1917), 193 S. W. 93.

It may be noted, however, that the Cummins Amendment, which restricts the right of a carrier to limit its liability, does not apply to a claim on a shipment, which was made before the Cummins Amendment was enacted. Bryan v. L. & N. R. Co. (N. C. 1917), 93 S. E. 750; McRary v. Southern Ry. Co (N. C. 1917). 94 S. E. 107; Central of Georgia Ry. Co. v. Yesbik (Ga. 1917), 92 S. E. 527.

While Congress has completely occupied the field of interstate commerce, the state courts are not deprived of jurisdiction. Whenever there is no call for the rate regulating discretion of the Interstate Commerce Commission to be exercised, or the question of discrimination between shippers is not involved, or there is no other provision which expressly prohibits state courts from exercising jurisdiction, the state courts have jurisdiction. Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412.

A suit to compel an interstate carrier to receive property for transportation from one state to another is within the jurisdiction of the courts, and not of the Interstate Commerce Commission. Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412.

Since the Interstate Commerce Act itself requires the furnishing of suitable cars and reasonable dispatch, the rule that, in case of conflict between the state and federal statutes, the latter controls, does not prevent operation of Code Supp. 1907, § 2116, providing that every railway

damage, or injury complained of is due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence then no notice of claim or filing of claim shall be required as a condition precedent to recovery. Since it is very evident that in practically all cases for loss and damage, the carrier could not have been held unless the jury found it was negligent, it appears a shipper can recover in all instances even though

corporation shall, upon reasonable notice and within a reasonable time, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch. Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412.

While the original Interstate Commerce Act § 8 (U. S. Comp. St. 1916, § 8572), providing that any common carrier subject to the provisions of the act, which omits to do anything required by the act, shall be liable to persons injured thereby for the full amount of damages sustained, may have been superseded to some extent by amendments to the act, the state courts were not deprived of jurisdiction in actions for damages by failure to furnish cars. Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412.

In Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412, the court said, p. 418:

"The state courts have concurrent jurisdiction with the federal courts of causes of action for injuries to interstate shipments of live stock, though such shipments are governed exclusively by the federal law. Jackson v. Chicago & N. W. Ry. Co., 34 S. D. 153, 147 N. W. p. 732."

State courts when considering interstate shipments are bound not only by the Carmack Amendment (Act Cong. Feb. 4, 1887, c. 104, § 20, 24, Stat. 386, as amended by Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1916, §§ 8604a, 8604aa]), but by the interpretation put on it by the federal Supreme Court. Barnet v. N. Y. C. & H. R. R. Co. (N. Y. 1918), 118 N. E. 625.

In suits brought for the enforcement of rights concerning interstate commerce, but not for the specific enforcement of the provisions of the Interstate Commerce Act, state courts have concurrent jurisdiction with federal courts. Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412.

A contract for the interstate shipment of live stock must be construed and measured by the Interstate Commerce Act (Act. Cong. Feb. 4, 1887, c. 104, 24 Stat. 379), and neither the state laws of the place of contract nor the laws of the state of the forum have any application. Bilby v. Atchison, T. & S. F. Ry. Co. (Mo. 1917), 199 S. W. 1004.

The rights of parties to interstate shipments depend wholly upon the federal statutes, the bills of lading, and the rules of the common law, as accepted and applied in the federal courts. Haglin-Stahr Co. v. Mont-

no claim has been filed with the carrier. The only requisite would seem to be that where a claim has not been filed the

pelier & W. R. R. Co. (Vt. 1918), 102 Atl. 940.

On the question of proximate cause, when considering the interstate shipment, the state courts must follow the federal court. Barnet v. N. Y. C. & H. R. R. Co. (N. Y. 1918), 118 N. E. 625.

In considering an interstate shipment, the state courts must follow the federal decisions that the rule in the United States courts—that where the carrier shows that the loss was occasioned by the act of God, the shipper, claiming the carrier's negligence also directly contributed to the injury, must show that fact—is a rule of substance, rather than of procedure. Barnet v. N. Y. C. & H. R. R. Co. (N. Y. 1918), 118 N. E. 625.

In Baird Bros. v. Minneapolis & St L. R. Co. (Ia. 1917), 165 N. W., 412, the court said, p. 418:

"A suit to compel an interstate carrier to receive property for transportation from one state to another is within the jurisdiction of the courts, and not of the Interstate Commerce Commission. Louisville & Nashville R. R. Co. v. Cook Brewing Co., 172 Fed. 117, 96 C. C. A. p. 322, 40 L. R. A. (N. S.) 798."

Also see Duscal Chemical Co. v. Southern Pac. Co., 168 N. Y. S. 617, 618.

Congress has paramount authority over interstate commerce, but the state may regulate that part of the commerce of an interstate carrier which is purely intrastate, subject to such regulation by federal authority as is necessary to regulate interstate commerce, and as to commerce which is both intrastate and interstate the state may regulate that which is within the state and even indirectly affect the interstate portion, in the absence of action by Congress, provided the state requirements do not amount to a burden upon interstate commerce, but wherever interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other Congress and not the state is entitled to prescribe the rules. State Public Utilities Comm'n v. Baltimore & O. S. W. R. Co. (Ill. 1917), 118 N. E. 81.

Section 4491, G. S. 1913, providing that "every common carrier transporting grain shall give the shipper, on request, a receipt for the number of pounds of grain received from him, and shall deliver such quantity to the consignee * * * less loss from transportation, not to exceed sixty pounds to each car," construed as it must be with section 4492, which provides for a penalty for failure to deliver the proper quantity of grain, is held to be a penal provision only, and it does not in any manner affect the civil liability of the carrier. This civil liability remains as at common law, save as this may be modified by other provision of statute. National Elevator Co. v. Great Northern Ry. (Minn. 1917), 164 N. W. 79.

There may be a cause of action under the common law against a common carrier for its negligence or wrongful acts resulting in damage or loss to a shipper of an interstate shipment, notwithstanding the federal statute governing such shipments.

shipper must plead negligence on the part of the carrier.[2½] The Cummins Amendment is not a separate statute, but is an amendment to the Act. It must, therefore, be construed as a part of, and in connection with other portions of the Act, and in such a way as to give effect to the whole statute. There does not seem to be any indication of legislative intent to change any provision of the Act other than that part known as the Carmack Amendment. The new amendment should, if possible, be so construed as to give full force to its clear purpose, without impairing the effect of any other provision of the Act.[3] It may also be noted the Cummins Amendment does not apply to export and import shipments to and from foreign countries not adjacent to the United States.[3½]

2. State Regulation. State regulation is only valid now where it incidentally affects interstate commerce, or is in aid thereof. Otherwise state regulation is void, except in those cases

Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N. E. (Ind. 1916), 461.

The proviso of the Carmack Amendment, preserving remedies or rights of action under existing laws, refers only to remedies existing under federal laws, and does not preserve rights or remedies existing under state laws prior to Carmack Amendment. Pennington v. Grand Trunk, Western Ry. Co., 115 N. E. (Ill. 1917), 170.

Where the suit is against a connecting carrier, and not against the initial carrier, of an interstate shipment, it is incumbent upon the claimant to allege and prove that the loss and damage to his shipment were caused by the negligence of the carrier according to the law in existence prior to the enactment of he Carmack Amendment. The right or remedy reserved in the Carmack Amendment is such right or remedy as he may have had under existing federal law at the time of his action, but no right or remedy under the state law differing from the federal law is by that act reserved to the shipper. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. Pennington v. Grand Trunk, Western Ry. Co., 115 N. E. (Ill. 1917), 170, 171.

The common-law doctrine that a carrier will not be permitted to relieve himself from the consequences of negligence on his part, or on the part of his servants or employes, is generally upheld by the federal and state courts. Western Union Telegraph Co. v. Piper (Tex. 1917), 191 S. W. 817.

2½. Hailey v. Oregon Short Line, 253 Fed. 569.

3. The Cummins Amendment, 33 I. C. C., 682, 692.

3½ The Cummins Amendment, 33 I. C. C., 682, 693.

as intoxicating liquors, with respect to which Congress has expressly authorized the State to act, or in the case of strictly state shipments.[4]

4. Adams Express Co. v. Croninger, 226 U. S. 491; 33 Sup. Ct. 148.

So a state statute imposing a penalty of $50.00 on a common carrier for failure to adjust a claim for damages within 90 days on a shipment made within the state, and within four months in case of shipments from without the state, is rendered inapplicable by a rule of the Interstate Commerce Commission, providing that a carrier must dispose of a claim within six months. Morphis v. Southern Express Co. (N. C.), 83 S. E. I.

Also see C. & W. C. R. Co. v. Varnville F. Co., 237 U. S. 597, 59 L. Ed., 1137, 35 Sup. Ct. 715; Trakas v. Southern Ry. Co., (S. C. 1915), 86 E. 492.

Thus the law of South Carolina prescribing a penalty for failure to deliver freight upon payment of charges is annulled by the Interstate Commerce Act. Fennell Infirmary v. So. Ry. Co. (S. C. 1915), 85 S. E. 237, 239.

So, although Congress has the power to regulate commerce among the several states, there are certain duties the performance of which by common carriers the state may impose under its police power, notwithstanding such carriers engage in interstate commerce; the states not having surrendered that power to the federal government. M. K. & T. Ry. v. State (Tex. 1916), 181 S. W. 721.

A state is not prohibited absolutely from regulating interstate commerce, but its powers are restricted only where Congress has exercised its power of regulation. Adams Express Co. v. Croninger, 226 U. S. 491; 33 Sup. Ct. 148, 149; 57 L. Ed. 314.

So a state enactment may be valid, though it incidentally affects interstate commerce, as where the enactment is an aid to such commerce, instead of a burden or interferes with it. M. K. & T. Ry. v. State, *Supra.*

Hence, there being no legislation of Congress on the subject, it is within the power of a state and of the state Railroad Commission thereof to require that trains though they be of interstate character, be moved from termini and junction points not more than 30 minutes behind the regular schedule, and on such schedule at all other stations, since, in so far as that requirement affects interstate commerce, it is in aid thereof; it being within the power of the state, in the absence of action by Congress, to exercise its police power in promoting the safe carriage of passengers on interstate trains. M. K. & T. Ry. v. State, *Supra.*

And a state may provide for a moderate attorney's fee in suits on claims. M. K. & T. Ry. v. Harris, 234 U. S. 412, 58 L. Ed. 1377; 34 Sup. Ct. 790.

So a statute requiring separate accommodation for white and negro passengers on trains operated within the state is valid. It is held that a train is "operated within the state" if it passes between two stations in the state, though its principal business is interstate. L. & N. Ry. v.

3. DETERMINATION OF STATUS.

—Who Are Common Carriers. On account of the broad application of these new statutes, decisions defining who are common carriers become of increasing interest. All persons know railroads, express companies, steamships, and the like are common carriers. But there are many other persons who carry for hire, who, when a loss occurs, attempts an exemption of the insurer's

Commonwealth (Ky. 1916), 188 S. W. 394.

Neither can such a statute be questioned on the ground that it affects interstate commerce in a case in which its application affects only intrastate business. L. & N. Ry. v. Commonwealth, *Supra.* Also see Chicago v. C. & N. Ry. (Ill. 1916), 113 N. E. 849.

Some attempt has been made to extend the Interstate Commerce Act beyond the limit originally contemplated. Thus it has been held that the Carmack Amendment, providing that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the holder for any loss or damage caused by it or by any connecting carrier, does not make a domestic carrier liable for loss occasioned by the negligence of a foreign carrier of transportation in foreign countries, but only of the commerce between the states and territories within the United States. Aldrich v. Atlantic Coast Line (S. C. 1916), 89 S. E. 315.

Congress has taken possession of the field of interstate commerce by telegraph and it results that the power of the states to legislate with reference thereto has been suspended. The great necessity that commerce between the states should be free from such interference applies in a marked degree to interstate commerce by telegraph. If a state regulation should be held valid in one state and void in another the illustration may be extended to all the states of the Union, then the power of the United States to regulate commerce between the states in relation to telegraphic business would not only be directly interfered with, but destroyed. Gardner v. Western Union Tel. Co., 231 Fed. 405, 411.

Pecos & N. T. Ry. Co. v. Hall (Tex. 1916), 189 S. W. 535.

Under Act, Feb. 2, 1903, authorizing the Secretary of Agriculture to make the rules and regulations for the transportation of animals and animal products, to suppress and extirpate communicable diseases, and section 3, making a violation of its provisions or any of the rules a misdemeanor, one violating rules of the Secretary of Agriculture is, despite the prohibition against delegation of legislative authority, guilty of an offense; the offense being declared by the act and the Secretary of Agriculture merely filling in the details by means of his regulation. United States v. Pennsylvania Co., 235 Fed. 961.

In such case, in view of the pur-

liability which is inherent in the liability of a common carrier. It is on account of these instances, not so rare as one might suppose, that renders a consideration of this topic of some importance. Whether a party is or is not a common carrier depends, in the last analysis, upon the facts concerning the business and the way it is conducted. If the carrier carries goods as a public employment, undertaking to carry goods for persons generally, and holds himself out to the public as ready to engage in that business as a business and not as a casual occupation, he comes

pose of the act under which the regulations were made and the terms of the orders themselves, it is to be presumed that they were adopted to carry out only the provisions of the act, and are not invalid as applying to intrastate shipments of stock and hides, etc. United States v. Pennsylvania Co., 235 Fed. 961.

Pursuant to such act, an order of the Bureau of Animal Industry defined quarantined areas as those portions of states quarantined for foot-and-mouth disease, and closed areas as those portions of quarantined areas where interstate and foreign transportation of domestic animals is prohibited, and that of animal products is restricted. General regulations authorize shipment of hides which have received an ante-mortem or post-mortem federal inspection without disinfection, where the shipper makes an affidavit certifying to such fact, and further provide that during the existence of the quarantine, hides taken from animals prior to a fixed date, which have been stored away from cattle, might, on affidavit to that fact, be shipped without disinfection. *Held*, that in view of the statute, the regulations were reasonably intended to fulfill its purpose. United States v. Pennsylvania Co., 235 Fed. 961.

Act Feb. 2, 1903, authorizing the Secretary of Agriculture, for the purpose of suppressing and preventing the spread of contagious diseases of livestock, to establish rules and regulations concerning the transportation of such live stock, and to make such regulations as may be deemed proper to prevent the introduction and dissemination of such diseases in interstate commerce, as well as to seize, quarantine, and dispose of hay, straw, fodder, or other animal products coming from infected foreign countries, or from one state to another when advisable, is valid, not being an improper delegation of legislative functions; for as new conditions arise from time to time, and prompt and stringent measures may be necessary to stamp out an epidemic, it is proper for Congress to give to executive officers authority to establish regulations to prevent the spreading of such diseases. United State v. Pennsylvania Co., 235 Fed. 961.

While with respect to the substantive law governing interstate shipments, the power of the state is now at an end, it still has power to pass laws with respect to the manner in which suit shall be brought for loss or damage to freight, and to establish rules respecting the method of

within the definition of a common carrier.[5] So truckmen, wagoners, cartmen, porters and other persons who undertake to carry goods for hire for the public generally, and as a common employment in a city, are common carriers, and the fact that they have no regular tariff for their charges, but fix a special price for each job, does not change the relation.[6] Of course the test of whether the business is a public calling is whether there is indiscriminate dealings with the general public.[7] There-

submitting evidence. So a law providing that where goods are delivered to a carrier and a negotiable bill of lading is issued they cannot thereafter be attached while in the carrier's possession by garnishment or otherwise, unless the bill is first surrendered to the carrier or its negotiation enjoined, does not interfere with interstate commerce in respect to the attachment of cars within the state, though engaged in interstate commerce. Stamford Rolling Mills v. Erie R. R. (Pa. 1917), 101 Atl. 823.

Where goods have been shipped under a negotiable bill of lading, they are not subject to foreign attachment while in transit, or after their stoppage in transit, whether the carrier continues to hold them as carrier, or as a warehouseman or bailee, as the Pennsylvania law relating to warehouse receipts and the sale of goods, are identical in effect with another state law, expressly protecting such goods from attachment, unless the bill of lading has been surrendered or its negotiation enjoined. Stamford Rolling Mills v. Erie R. R. Co. (Pa. 1917), 101 Atl. 823.

While the Legislature can establish rules of evidence, change the burden of proof, or declare that a fact, from which an inference as to the existence of another fact may reasonably be drawn, shall be regarded as evidence of the latter fact, it cannot declare in such case that the existence of the first fact shall conclusively establish the existence of the second, since that would be an invasion of the power of the judiciary. Shellabarger Elevator Co. v. Ill. Cent. R. Co. (Ill. 1917), 116 N. E. 170.

5. Campbell v. A. B. C. Storage & Van Co. (Mo. 1915), 174 S. W. 140, 141.

6. Campbell v. A. B. C. Storage & Van Co. (Mo. 1915), 147 S. W., 140, 141.

7. Campbell v. A. B. C. Storage & Van Co. (Mo. 1915), 147 S. W., 140, 141.

The operator of an incline for hire, who undertook to carry the cargoes of all vessels plying the river up the incline to the cars of a railroad company, was a "common carrier." Joest v. Clarendon & Rosedale Packet Co. (Ark. 1916), 183 S. W. 759.

Even if an expressman, delivering packages and parcels in a local district, be not strictly a common carrier, as to extent of liability, he by his contract of carriage agrees to use proper care and attention in carrying and delivering a parcel. Astrella v. Laffey (Mass. 1916), 111 N. E. 681.

fore a wagoner who follows hauling for a livelihood, and advertises to the world that he will take goods of all persons indifferently for transportation from place to place, is a common carrier.[8] A towing company that maintained no ticket office or freight office, issued no bills of lading, that did not hold itself out to carry for the public indiscriminately, but transported either its own propery or that of others under special contract or arrangement is not a common carrier but a mere bailee for hire.[9]

Where a transfer company which was chartered to engage in the business of the transportation and carriage of passengers, and their baggage, and other persons and goods, wares, and merchandise, between the various stations and other points in the city and counties, held itself out as ready to receive and transport all who applied for carriage and were ready to pay the compensation demanded, it was a common carrier with respect to its taxi-cab business, undertaking to carry persons and property generally, offering its services to all. Carlton v. Boudar (Va. 1916), 88 S. E. 174, 175.

8. A local carrier, such as a cabman, wagoner, or transfer man, carrying passengers and baggage for the public generally, from place to place in and about a city, or from town to town, is a common carrier, and, in his relations with his patrons, he is governed by the general legal principles applicable to carriers doing business on a larger scale. Brown Shoe Co. v. Hardin (W. Va. 1916), 87 S. E. 1014.

If a person transports goods as a public employment, undertaking to carry goods from persons generally, and holds himself out to the public as ready to engage in that business, as a business and not as a casual occupation, he comes within the definition of a common carrier, but all common carriers are not subject to the Interstate Commerce Act, even though, incidentally, they may perform services which affect interstate commerce. Thus, a local baggage carrier transporting baggage from a railroad terminal to residences in a city, is performing services connected with interstate passenger traffic, but is not a common carrier or express company, subject to the provisions of the Carmack Amendment. Noel v. Westcott Express Co., 158 N.Y. S. 703.

Of course, an express company receiving goods for transportation in the ordinary course of business, is held to be a common carrier, and liable as such, but express companies perform various services and may be acting in a different capacity from that of a mere common carrier, and therefore not be liable as such. So it has been held that an express company which acts as agent for the owner in arranging for the transportation and carriage of goods without having possession or transporting them as a common carrier, is not liable as such for loss or damage. Tillen v. American Express Co. (Mo. 1916), 186 S. W. 1102.

9. Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co. (Mo. 1917), 191 S. W. 1026.

One important feature which distinguishes the legal status of the common carrier from the private carrier is that a private carrier has no lien for charges. This may often be an important difference, especially if a dispute arises over charges.[10]

4. **What Is an Interstate Shipment.** It is very important to know exactly whether a shipment is state or interstate, that is, a shipment strictly local to the state in which it originates or one moving from one state to another. In the latter case it is governed by entirely different rules of law than applicable to the former. If it is an interstate shipment it is governed entirely by the federal legislation, and this legislation imposes a very different right and duty to what the different state laws impose. For instance, on a state shipment there may be a penalty prescribed by the state for not furnishing a car promptly, or not paying a claim promptly. Statutes of this kind are very common among the states. If it is an interstate shipment, however, none of the penalties prescribed by these statutes apply. Very often, it is a

In Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co. (Mo. 1917), 191 S. W. 1026, the court said, page 1028:

"It appears that on the Osage river plaintiff was engaged principally in transporting its own ties, and that thereafter it was engaged almost exclusively, if not entirely so, in transporting ties for defendant.

"The test of whether the business is a public calling is whether there is indiscriminate dealing with the general public. 1 Wyman on Pub. Service Corp. § 227. It is the willingness to serve all that makes the employment a public one. If the carrier, however, does not deal with the public indiscriminately as a matter of routine, but in effect makes an individual bargain in each case, this course of business shows that the service is upon a private basis. 1 Wyman on Pub. Serv. Corp. § 239. * * * Whether a person is or is not a common carrier is to be determined from the facts bearing upon the nature of the calling, the basis on which he contracts and whether he holds himself out to the public as a carrier in such manner as to render himself liable to an action if he should refuse to carry for any one who wished to employ him. See Campbell v. Storage & Van Co., 187 Mo. App. loc. cit. 570, 571, 174 S. W. 140, loc. sit. 141, and authorities cited. Plaintiff was therefore a private carrier, occupying the relation to defendant of a bailee for hire. It was not an insurer of defendant's property which it undertook to transport, but was charged with the duty of exercising ordinary care for its safety."

10. Campbell v. A. B. C. Storage & Van Co. (Mo. 1915), 174 S. W. 140, 141.

matter of extreme difficulty to determine whether a shipment is state or interstate. Thus, a shipment may originate in one state and be destined to a point in that state, yet nevertheless, it is an interstate shipment, if, in the course of its journey, it travels ouside of the borders of its originating state. Sometimes a state movement is the tail, so to speak, of an interstate haul and it is important to determine whether this tail haul should be considered as an interstate haul or a strictly straight state haul. This question is important oftentimes in determining the applicability of certain rights. For instance, coal dealers in Iowa purchased coal from Illinois mines. It was shipped from Illinois to Davenport, Iowa. There these coal dealers took possession of it and resold the coal to customers in the state of Iowa. The question came up as to whether the haul from Davenport to the consuming points in Iowa was a strictly state haul. If it was, then the local state rate would apply on the shipment. If it was not, but was to be considered a part of the original haul, then the through state rate from the original point of origin to the ultimate destination would apply and in many cases, of course, this rate would be very much higher. In this particular case the Supreme Court of the United States held that the tail haul was separate and distinct from the original haul and that, therefore it was a local movement and took only a state rate. The Supreme Court, however, laid stress upon the fact that it was not the mere fact of billing that determines whether a haul is state or interstate but one of intention, that is, at the time a shipment moves from its original shipping point, is the ultimate destination known? If it is known, and, if it is intended that the shipment should go to that destination, then the shipment is a through interstate shipment and no device on the part of any person having custody of the same can alter this fact. In the Davenport coal case just referred to it was found as a fact that at the time the coal was purchased from the Illnois mines it was not known who the ultimate consumer would be nor ultimate destination. In fact, this coal was resold to consumers after it had arrived in Iowa. It was therefore held that there was a complete breaking of the transit at Davenport and it could not be considered a through movement. It has been stated that an interstate shipment exists when a commodity has been turned over by a

shipper to a common carrier, to be transported from one state into another under a contract of shipment, the definite character of the shipment being fixed, when the movement of the commodity has commenced for the purpose of transportation.[11] In this case it was held that after cars of grain under a shipment from other points in the state to Kansas City to be there sold, have arrived, the act of convenience of the carrier placing it on a hold track in the state of Kansas till the grain is sold does not destroy the intra-state character of the shipment. In this case grain was shipped in carloads to points in the state from other points therein to be sold by a consignee on the floor of the Board of Trade, with no intention of the shippers, express or implied, to ship beyond such point. The court therefore correctly held that it was an intra-state shipment, any further shipment, under the buyer's directions, being a new one.[12] It must be also remembered that the intention which was in the minds of the parties when a shipment originates is of imporaance in determining whether or not it is a through interstate shipment. So, even if the possession be taken at some point, and a new bill of lading issued (as is sometimes done to obtain a combination of state rates), the through character of the shipment is not destroyed if when it began to move its ultimate destination was known, and it was intended to move there.[13]

5. **What Law Governs the Validity and Interpretation of the Contract of Shipment.** It is sometimes of importance to determine whether the rights of the claimant arise under the laws of the state where the contract is entered into or under the laws of the state where it is completed, that is, where the shipment is delivered. Supposing a shipment of goods is made from Chicago to Pennsylvania, in some subsequent litigation it might be important to settle whether the laws of Illinois or the laws of Pennsylvania governed the shipment. Ordinarily the lex loci contractus governs the contract so far as its validity is concerned, that is, the law of the state where it is entered into. Then, when

11. State v. Public Service Commission (Mo. 1916), 189 S. W. 377.

12. State v. Public Service Commission (Mo. 1916), supra.

13. A. T. & S. F. Ry. v. Harold, 36 Sup. Ct. 655, 241 U. S. 371, 60 L. ed. 1050.

it is to be delivered to another place it is said that the law of the place of delivery is to govern any interpretation or construction of the contract. Sometimes, when suit is brought in a state different from that of the point of origin or the place of delivery, it is said that the lex fori governs the remedies of the parties in the state in which the action is brought. It must be remembered that the contract of an interstate shipment, however, is somewhat different from that of an ordinary contract, in that it is subject to different regulations. It has been said in the state courts that the law of the place where a contract of shipment is made must, in the absence of proof of the contrary intention of the parties, be looked to for the creation of obligations imposed by and the interpretation of any rights arising out of it.[14] The laws in force at the time and place of the making of the contract and which affect its validity, performance and enforcement, enter into and form a part of it as if they were definitely referred to or incorporated in it.[15] A bill of lading is a contract and within this rule.[16] On account of the Commerce Clause of the Federal Constitution, Congress has power over interstate shipments to the same extent as a state might have over a strictly state shipment. Furthermore, the power of Congress is exclusive, that is, after Congress has once legislated with regard to an interstate shipment the power of the state to regulate that shipment is gone and totally abrogated; therefore, interstate shipments come under the domain of congressional legislation. As a matter of fact, Congress has now legislated on so many phases of interstate shipments that it may be said that, generally speaking, the power of the state with respect to such shipments, is totally at an end. Where, therefore, a bill of lading is issued it must be interpreted in the light of the federal legislation.[17]

14. Modell Mill Co. v. Carolina B. & O. Ry. Co. (Tenn. 1916), 188 S. W. 936.

In an action for tort, the law of the place where the wrong or tort was committed controls on the question of damages. Western Union Telegraph Co. v. Smith (Tex. 1916), 188 S. W. 702.

15. Van Hoffman v. Quincy Wall., 535, 550, 18 L. Ed. 408, 409; Walker v. Whitehead, 16 Wall. 314, 317, 21 L. Ed. 357, 358; Edward v. Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793, 796.

16. Northern Pacific Ry. Co. v. Wall, 36 Sup. Ct. 493, 495.

17. Northen Pacific Ry. Co. v.

It is therefore the settled law, as laid down by the Supreme Court of the United States that the federal legislation is paramount, and the obligations of the parties as evidenced by the contract of shipment is to be determined solely with respect to what is the federal law. So it has been said in the state courts that the Interstate Commerce Act and its amendments have been decided by the Supreme Court of the United States to control the interpretation of a written contract on interstate shipments of livestock.[18]

Wall, 36 Sup. Ct. 493, 495. Cleveland, C. P. and St. L. Ry. Co. v. Dettlebach, 239 U. S. 588, 593. 36 Sup. Ct. Rep. 177.

It cannot be assumed merely because the contrary has not been established by proof that an interstate railway carrier is conducting its affairs in violation of controlling Federal legislation. Cincinnati, N. O. & T. P. Ry. Co. v. Rankin, 36 Sup. Ct. 555.

So under its power to regulate interstate commerce. Congress may forbid the transportation from state to state, or from foreign countries into the United States, of articles or pictures tending to debase the public; and, therefore, in view of the brutalizing nature of prize fights, the Act of July 31, 1912, c. 263, § 1, forbidding the introduction into the United States of films showing prize fights, or the transportation of such films from state to state, is constitutional. Unied States v. Johnson, 232 Fed. 970.

18. A. T. & S. F. Ry. v. Bement (Tex. 1916), 189 S. W. 70.

II.

BEGINNING OF LIABILITY.

1. Delivery to the Carrier.
2. History of Bill of Lading.
3. Report of Interstate Commerce Commission Prescribing Bill of Lading.
 —Liability of Common Carriers Under the Common Law.
 —Nature and Functions of the Bill of Lading.
 —Liability of Common Carriers Under the Federal Statutes.
4. Issuance of Bill of Lading.
 —In General.
5. Necessity of Issuing Bill of Lading.
6. Characteristics of Bill of Lading.
7. Recitals in Bill of Lading.
 —Shippers Load and Count Notation.
8. Fraudulent or Disputed Bills of Lading.
9. Agent of Carrier.
10. Power of Agent to Bind Shipper.
11. Destruction Before Transportation.
12. Failure of Carrier to Furnish Facilities.
13. Place and Manner of Furnishing Cars.
14. Embargoes.
15. Transportation Over Designated Route.

1. **Delivery to the Carrier.** The liability of the carrier begins as soon as the goods are in its custody, but it is sometimes very difficult to determine when this has happened. The delivery must be complete so that the owner has parted with all dominion over the goods and nothing further remains to be done by him. Contrary to a very prevalent impression, the issuance of a bill of lading is not essential to subject the carrier to its lia-

bility. An oral contract is sufficient to charge the carrier. Very often delivery to the carrier may be constructive, that is, where a carrier is in the habit of receiving goods at a certain place without formal notice that shipments are awaiting transportation, its liability as an insurer may begin from the time the goods are put in such a position. This particular doctrine, however, must be applied with a great deal of caution. If, by a course of dealing, it is the habitual practice and usage of the carrier to receive goods for transportation upon a private wharf or team track used exclusively by it, a deposit of the goods in the usual and accustomed manner may be regarded as a sufficient delivery.[1]

1. The issuance of a bill of lading is only evidence that the carrier has received and accepted the shipment for transportation.

Milne v. Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. 85.

Cohen Bros. v. Missouri, etc., R. Co., 44 Tex. Civ. App. 1, 7.

But the liability of a railroad as a common carrier begins immediately it receives the goods for shipment:

Michie on Carriers, p. 292, citing the following cases:

Bowen v. Watch Witch, Fed. Case, No. 197, 1971, 19 How. Prac. 241.

Snow v. Carruther, Fed. Case, No. 13, 1441 Spr. 324.

Alabama Mid. R. Co. v. Danby, 119 Ala. 531, 24 So. 713.

Garner v. St. Louis, etc. R. Co., 79 Ark, 353, 20 R. R. 527, 48 Am. & Eng. R. Cas., N. S. 527, 96 S. W. 187, 116 Am. St. Rep. 83.

Pine Bluff, etc. R. Co. v. McKenzie, 75 Ark. 100, 16 R. R. R. 50, 39 Am. & Eng. R. Cas., N. S. 50, 86 S. W. 834.

Illinois Central R. Co. v. Smyser 38 Ill. 354, 87 Am. Dec. 301.

Lord v. Maine Central R. Co., 105 Me. 255, 33 R. R. R. 130, 56 Am. & Eng. R. Cas., 130, 74 Atl. 117.

Melchoe v. Chicago, etc. R. Co., 116 Mich, 69, 74 N. W. 301.

Aiken v. Chicago, etc. R. Co., 68 Iowa 363, 27 N. W. 281, 25 Am. & Eng. R. Cas. 377, 10 Am. & Eng. R. Cas., N. S. 82.

Landes v. Pacific Railroad, 50 Mo. 346.

Coyle v. Western R. Corp., 47 Barb. 152.

Salinger v. Simmons, 57 Barb. 513, 8 Abb. Prac. N. S. 409, 2 Lans. 325.

Berry v. Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

East Line, etc. R. Co. v. Hall, 64 Tex. 615.

International, etc. R. Co. v. Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

Roy v. Griffin, 26 Wash. 106, 66 Pac. 120.

Parker v. Great Western R. Co., 7 M. & G. 223, 7 Scott N. R. 835, 8 Jur. 194, 13 L. J. C. P. 105, 3 Railw. Cas, 563, 1 Ry. & C. T. Cas. 15.

A carrier having accepted goods for shipment as soon as practicable, in the usual course of business, and not to await further orders, and having placed them in the station for its own convenience, its liability as carrier for their loss commenced at

C. P. Ry. Co. v. Wieland, 226 Fed. 670.

Where it is the custom of a railroad company when requested to place an empty car upon its sidetrack at a flag station to be loaded with cotton, and when loaded, to remove the car, and subsequently issue a receipt and bill of lading, the railway company is liable for the loss of cotton so loaded, if notice has been given by shipper of its destination, and that it is ready for removal, and nothing remains to be done by him before shipment; although no receipt or bill of lading has been given for the cotton, and the name of the consignee has not been furnished to the carrier. St. Louis, etc. R. Co. v. Murphy, 60 Ark. 333, 30 S. W. 419. Also see:

Deming v. Merchant's Cotton Press, etc. Co., 90 Tenn. 306, 17

Hernsheim v. Newport News, etc. Co., 18 Ky. L. Rep. 227, 35 S. S. W. 89, 13 L. R. A. 518. W. 1115.

Green v. Louisville, etc. R. Co. 163 Ala. 138, 50 So. 937.

Central, etc. R. Co., 170 Ala. 627, 54 So. 205, Am. Cas. 1912 D. 965.

Meyer v. Vicksburg, etc. R. Co., 41 La. Ann. 639, 6 So. 218, 17 Ann. St. Rep. 408.

Whitehurst v. Texas, etc. R. Co., 131 La. 139, 59 So. 42.

Morris Grain Co. v. M. P. Ry. Co. (Mo. 1915), 170 S. W. 404, Gulf, C. & S. Ry. Co. v. D. S. Cage & Co. (Tex. 1915), 174 S. W. 855.

It has been held that the failure of a carrier to move a carload of lumber, after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property within the carrier's fault. Green v. Louisville, etc., R. Co., 163 Ala. 138, 50 So. 937. But see Central, etc. R. Co. Sigma Lumber Co., 170 Ala. 627, 53 So. 205, Ann. Cas. 1912 D. 965.

A common carrier may, by special arrangement with a shipper or by implication through habitual custom and usage, agree to accept and receive goods for transportation placed along its line for shipment at places other than the regularly designated places for the reception and delivery of freight. Gulf Coast Transp. Co. v. Howell, (Fla. 1915), 70 So. 567.

On the other hand, it is held that a carrier may limit its liability for loss from fire. To this, however, is added the important qualification that it cannot limit this loss where the fire is occasioned through its negligence or the loss is occasioned through its negligence. Michie on Carriers, p. 725, 953, 958, 970, 1020, 1021, 1022.

Under the Cummins Amendment, the liability of the carrier as an insurer commences when the property

once.[2] So where the claimant left a box to be shipped by express in the custody of the agent of the carrier, and the station was destroyed by fire, the mere fact that the agent had not issued a receipt for the box did not destroy the relation which the carrier had of insurer towards the package.[3] Where the depot did not open for the train upon which claimant was to ship stock, but his shipping bill was made out the night before, as usual, and left in the bill box, when the claimant loaded the hogs in the morning about the time the train was due, there being no snowstorm then prevailing rendering the loading improper, the relation of

is delivered to it for transportation, and the liability of the carrier as such insurer cannot therefore be limited. Unquestionably the property is in the possession of the carrier when placed on the shipper's side-track and the carrier is notified to remove it and issues a bill of lading therefor.

Section 1 of the uniform bill of lading reads as follows:

"For loss, damage, or delay caused by fire occurring 48 hours (exclusive of legal holidays) after notice of the arrival of property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the roperty or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

It will be observed under this section of the bill of lading that the carrier recognizes the right of the shipper to recover in case of fire except in two cases—one where the loss occurs subsequent to 48 hours after arrival at destination, and the other where the product is loaded on an open car.

2. Dionne v. Am. Exp. Co. (Vt. 1917) 101 Atl. 209.

A railroad is bound to carry all goods tendered to it. Hence it cannot refuse to transport frostbitten fruit. Spokane Valley Growers' Union v. S. & I. E. R. R. (Wash. 1918), 175 Pac. 184.

3. Dionne v. Am. Exp. Co. (Vt. 1917) 101 Atl. 209.

shipper and carrier was created, and the fact that about three hours later when the train arrived orders were given the trainmen not to move the car because a storm was raging, could not change the relation, although the claimant was present when the trainmen received the orders.[4] Common carriers are held to a very

v. Oreg. Short Line (Ore. 1916) 161 Pac. 565.

Where a shipper of cattle had notified the carrier that he would be ready to load seven cars of cattle at 8:00 o'clock on a specified morning and had his cattle in the pens when the stock train backed up to load, but had not finished weighing his cattle, and the stock train then took on two cars of cattle belonging to another shipper, and prior to such loading the conductor had talked to employees of the first shipper, and been told that all the cattle would not be ready for about two hours, and subsequently the stock train then picked up the two cars belonging to the other shipper, and at that time there were three cars of cattle of the first shipper ready to load, but the train proceeded on its way without the conductor stopping to inquire whether at that time there were any cattle ready: *Held*, the constituted negligence on the part of the carrier and the evidence clearly shows that the shipper had complied with his order, especially since it appears that all the cattle were ready for loading at 9:00 o'clock. Blackwell v. Oregon Short Line Ry. (Ore. 1916), 161 Pac. 565.

A carrier's undertaking to carry hunting dogs checked by a hunting party is separable from the undertaking to carry the party. Louisville & N. Ry. Co. v. Dickson (Ala. 1917), 73 So. 750.

The owners of hunting dogs paying for transportation and excess

4. Gormley v. C. & N. W. Ry. Co. (S. D. 1917) 165 N. W. 249.

Generally, delivery to a common carrier is not such a delivery to the purchaser as satisfies the statute of frauds. Spedding v. Griggs, Fuller & Co. (Mich. 1917) 162 N. W. 956.

The liability of the carrier commences when it has custody of the property. Delivery to the carrier may be either actual or constructive. It is constructive when the shipment is put in such position, that either by custom or contract the carrier is presumed to take custody of it and transport it from that place. The liability attaches to and continues throughout the entire transportation. So it is held that where the receiver of a carrier contracted to transport a shipment between two points in the same state and subsequently while in transit the destination of the shipment was changed to an interstate point, the receiver had authority to issue a new bill of lading, canceling the intrastate contract, and substituting an interstate contract. Ordinarily to render the carrier responsible the custody of the goods must be relinquished to it. Andrews v. Roberts (Tex. 1917) 192 S. W. 569, 571.

The liability as common carrier begins with the actual delivery of the goods for transportation, and not merely with the formal execution of a receipt or bill of lading. Blackwell

strict accountability for the loss and failure to deliver goods received by them for carriage. Such accountability is not founded on contract, but is imposed by law upon grounds of public policy

baggage could sue the railroad company, either ex contractu or ex delicto, for loss by death from poisoning of hunting dogs checked by them as baggage; the contract, so far as the railroad's liability for the dogs was concerned, being for the sole benefit of such owners. Louisville & N. Ry. Co. v. Dickson (Ala. 1917), 73 So. 750.

Where the negligence of a railroad in failing or refusing to accept a shipment of live stock at a connecting point concurred with the negligence of a connecting road in failing to deliver the shipment in question, on the transfer track, both companies were responsible for delays and the consequent damages proximately resulting from such negligence. St. L. S. W. Ry. v. Miller & White (Tex. 1916), 190 S. W. 819.

A shipper and the carrier may make such stipulations upon the matter of delivery to the carrier as they see fit, and when so made they govern. Blackwell v. Oreg. Short Line, *Supra.*

Where, in accordance with a recognized custom, a shipper notified the railroad company that he intended to ship a certain number of cattle next day, and had them ready to be loaded upon the arrival of the train, such acts known to the carrier and not objected to, constituted a delivery and an acceptance of the shipment; no written receipt or bill of lading being necessary. Blackwell v. Oreg. Short Line, *Supra.*

Where the station agent and conductor of a common carrier were informed the day before an intended shipment that the cattle were to be put into pens for shipment according to custom, no further formal notice was necessary. Blackwell v. Oreg. Short Line, *Supra.*

If the owner of baggage does not deliver it to the carrier but retains it in his custody, he thereby assumes the responsibility, and cannot hold the carrier for the loss of it, unless the loss occurred from the negligence or fault of the carrier, in which event the carrier is liable, not as a common carrier, but as an ordinary bailee for hire. L. & W. Ry. v. Dickson (Ala. 1917) 73 So. 750.

If the failure of a railroad to receive a shipment of live stock when tendered it by a connecting road was negligence, and such negligence prevented the shipment of the cattle that night to destination, the railroad cannot excuse itself from liability on the ground that it did not actually receive the shipment until the next day. St. L. S. W. Ry. v. Miller & White (Tex. 1916) 190 S. W. 819.

Of course by contract it can be specified when the goods shall be considered as having been delivered to the carrier so as to render the carrier liable as an insurer. Generally bills of lading provide that property destined to private tracks shall be considered to be at the owner's risk until attached to trains or after being detached from trains. In determining liability under such provision in

for the protection of the shipper, and, in the absence of a binding contract otherwise fixing liability, a common carrier is, with certain exceptions, liable as an insurer to a shipper for losses of or injuries

the bill of lading two questions present themselves. First, what is a private siding, and secondly, when is a car "attached" to, or "detached" from, a train. An interesting case has recently been decided with reference to what is a private siding. A shipper loaded a carload of merchandise on a siding in front of its warehouse which was located wholly upon the carrier's right-of-way and was constructed and maintained by the carrier. It ran parallel with the main tracks and was about one mile in length, being closed at each end by a bumper. It was connected with the main track by two switches. Along this siding and adjacent thereto were warehouses, used by firms to ship and receive freight over the carrier's lines. In front of the warehouse of the shipper and between it and the siding was a loading platform which was the property of the shipper. About 140 feet west of the warehouse was the freight house of the carrier. The car in which the merchandise was loaded had been placed by the carrier on the siding immediately before the shipper's warehouse in the morning. The shipper began loading and concluded at half past three in the afternoon of the same day, then made out a bill of lading, took it to the freight house, when the carrier signed it and sent a man to seal the car about five o'clock in the afternoon. The car remained on the siding until seven o'clock the next morning, not having been, up to that time, attached to any train. Shortly before seven o'clock it was discovered that the car had been broken open during the night and a portion of the merchandise stolen, for which claimant sued. The bill of lading contained the following provision: "Property * * * when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains." Held that since the car had not been, up to the time of the loss, attached to a train, the question in the case was whether or not the piece of track upon which the car stood at the time of the loss was or was not a "private or other siding." The court said: (Bers v. Erie R. R. 163 N. Y. S. 114). "It was not, strictly speaking, a private siding, either in ownership or use. Is it an 'other siding'?" The plaintiff contends that, in determing what is contemplated by these words, we must apply the rule ejusdem generis, and determine that the words "other siding" meant a siding in the nature of a private siding. Just what kind of a siding would be embraced in the words "other siding" under this rule of construction is not apparent. As we consider, a more reasonable construction of the clause is to hold that the purpose of using the words "other siding" was to make the condition comprehensive, so as to apply to all sidings whether public or private. This was the view taken by the Court of Errors and Appeals of

car is destroyed while standing on the side track near such junction. The question arises, does the provision in the bill of lading apply? It seems clear that on principle the provision does not. This exemption of liability is made to define the beginning and termination of the transsit. Once the carrier has assumed custody of the shipment, the transportation has commenced, and under the Cummins Amendment, any limitation is invalid. The provision referred to, therefore, must be strictly construed as applying solely to those cases where goods are destroyed before the carrier has begun to exercise any dominion over them, and, on the other hand, to those instances where the carrier has completely parted with their custody. Siebert v. Erie R. R., 163 N. Y. S. 111.

The uniform bill of lading provides that property received from private or other sidings shall be at owner's risk until the cars are attached to trains, and that no carrier shall carry or be liable for articles of extraordinary value not specially rated in the published classifications, unless a special agreement to do so at a stipulated value is indorsed thereon. A carload of ore shipped from Canada into the United States, and subject to the Interstate Commerce Act, was stopped and the ore unloaded at a sampling works siding pursuant to directions in the through bill of lading, and after sampling, the ore, together with five bags of metallic silver, valued at $1,595, was reloaded, the car sealed, and a receipt signed, and, before the car was attached to the train, it was broken into and the metallic silver stolen. *Held*, that the reshipment was equiv-

New Jersey in Standard Combed Thread Company v. Penn. R. R. Co., 88 N. J. Law, 257, 95 Atl. 1002, in which the court, passing upon the identical clause in question here, said: "It was not a private siding. The trial court held the view that a public siding was not, in the intendment of the clause, an 'other' siding. We do not share this view. If sidings are to be classified into private and other sidings, the other sidings would necessarily be other than private, and the logical alternative to 'private' is 'public.'" It is true that this construction was not necessary to the determination of the case then before the court, and that the expression of opinion above quoted may be classed as obiter dictum. Even so, however, it is of value as expressing the views of an important and highly regarded court, and coincides with the conclusion at which we have independently arrived. If we seek for the reason for the condition, we are confirmed in the view that it applies to all sidings, both public and private. The object and purpose of the condition is to define when the carrier's liability for lost property loaded on cars shall begin and shall terminate. The meaning and intent of the stipulation, which is a term of the contract of carriage, is that liability for such property shall begin when the car is removed from the siding and attached to a train, and shall terminate when it is detached from the train and placed on a siding.

Frequently a carrier may take possession of a car and transport it for only a few hundred feet to a junction point, and leave it there for another train to pick up. The

to goods being transported by such carrier.[4½] So, if a carrier receives the quantity of wheat stated in a bill of lading, and delivers a less quantity, it is liable for the difference.[4¾] Once the goods have been delivered to the carrier the rights and liabilities governing the shipment depend, to a large degree, upon the provisions in the bill of lading. It is important therefore to understand clearly the purpose and effect of this instrument. In considering this discussion, however, we can best grasp it by bearing in mind one thing. That is this: The bill of lading is a receipt for the shipment. There is nothing mysterious about it whatever. Bearing in mind therefore that it is merely a declaration by the carrier that it has received certain goods for transportation, let us consider first its history, as has been recently so well and succinctly traced by the Interstate Commerce Commission.

alent to an "initial shipment," so that the contents of the car were at the owner's risk. Siebert v. Erie R. R., 163 N. Y. S. 111.

Under a bill of lading providing that property, when received from or delivered on private or other sidings, should be at owner's risk until the cars were attached to and after they were detached from trains, an additional track on the carrier's right-of-way, parallel with and connected with its main track by two switches, and closed at each end by a bumper, used for the storage of cars and for making up trains, and for the convenience of warehouses fronting thereon, was a "siding," and, though not a private siding, was within the term "other sidings," as that term was used to make conditions comprehensive, so as to apply to all sidings whether public or private. Bers v. Erie R. Co., 163 N. Y. S. 114.

4½. A. C. L. R. R. v. Sandlen (Fla. 1918), 87 So. 667.

4¾. Where the bill of lading issued by a carrier recited that it received a certain quantity of wheat, and the car arrived at destination with seals intact, and the carrier showed that it inspected the car before placing the same for the shipper and that no leak was discovered, and that the car was inspected twice enroute, and no leak was discovered, but nevertheless at destination the car did check a certain number of pounds of wheat short, the carrier is responsible for such difference, as it is liable as an insurer for the full amount of the property delivered to it, and its only defense in case of an alleged shortage is to show that such quantity was not in fact delivered to it. Baker v. H. Dittlinger Roller Mills Co. (Tex. 1911), 203 S. W. 798.

But where a carrier proves that it delivered all the wheat received, which was carefully weighed and checked at destination, when it was found to weigh less than the bill of lading stated, the carrier is not liable for the discrepancy. Baker v. H. Dittlinger Roller Mills Co. (Tex. 1918), 203 S. W. 798.

2. **History of the Bill of Lading.** As far back as records of the law merchant goes, it has been customary to give a receipt for goods. From early times it seems to have been recognized that such receipts were not second in importance even to promissory notes. Their negotiable character was very early established in the law. They were the first legal security upon which bankers loaned money. The decisions on their construction and validity are pure creations of the common law. Owing to the fact that in the United States there are a number of so-called Code States, which do not recognize the common law, an attempt was made in this country to put in the form of a statute all rights and liabilities growing out of the bill of lading. Eventually a movement grew up for all the states to adopt what was known as the Uniform Bill of Lading Act, which sought to fix the rights of the various parties thereunder. This movement was successful in a large number of the states, by the time the Supreme Court of the United States decided that, owing to recent Federal legislation, Congress had occupied the entire field of interstate commerce to the exclusion of the states. The Federal Government then passed, at the 64th Congress, the Federal Bill of Lading Act, approved August 29, 1916, which applied to all interstate shipments, and whose provisions were substantially the same as in the Uniform Bill of Lading Act that had been adopted by the several states. This Act, however, did not completely touch all

Weights of goods shipped stated in the bill of lading being prima facie evidence of the amount received, the burden is on the carrier to show that it did not receive such amounts. Baker v. H. Dittlinger Roller Mills Co. (Tex. 1918), 203 S. W. 798.

The mere fact that weighing of wheat was done by a third person did not relieve a carrier of liability when it delivered a less quantity, where it accepted such weight and entered it on the bill of lading. Baker v. H. Dittlinger Roller Mills Co. (Tex. 1918), 203 S. W. 798.

While a recital of a bill of lading of receipt of a carload of agricultural implements is not conclusive that three certain implements were in the car, in connection with evidence that such articles were placed in the car, it is prima facie proof that they were in the car. John Deere Plow Co. v. American Express Co. (Mo. 1918), 203 S. W. 448.

In an action against a common carrier for damages to a shipment of fresh meat, evidence that the meat was packed as customary *held* sufficient to show that it was properly packed and in good condition at the time of delivery to the carrier. Cudahy Packing Co. v. Atchison T. & S. F. Ry. Co. (Mo. 1918), 201 S. W. 623.

rights and obligations concerning shipments as they existed between the carrier on one hand, and the shipper or consignee on the other hand. In the majority of cases such rights had still to be determined by the previous decisions in the federal courts and the provisions of the bill of lading. There were, however, many provisions in the bill of lading which had never been construed in the federal courts, and on which there had been many conflicting decisions in the state courts. It is true that in 1908 the Interstate Commerce Commission had recommended that certain prescribed forms of bills of lading be adopted by the carriers, and such bills of lading were in pretty general use. They were not in universal use because the Commission was doubtful of its authority to prescribe provisions in the bill of lading, and hence did not order the adoption of these forms, but merely recommended them. The state courts still felt at liberty to construe the meaning of these various provisions, and to pass upon their applicability to various cases, with the result that there were many divergent views expressed. Then, too, Congress, by the passage of subsequent legislation such as the Cummins Amendment, rendered doubtful the validity of various provisions contained therein. Finally, the jurisdiction of the Interstate Commerce Commission became clear, and in April, 1919, it issued a new report on the bill of lading situation, ordering carriers to transport interstate shipments under the forms it prescribed. It might not be amiss to quote from its opinion what it says concerning the history of the various events that have led up to its recent order.

3. REPORT OF INTERSTATE COMMERCE COMMISSION PRESCRIBING BILL OF LADING.

Statement of the Case. (52 I. C. C. 676): "This proceeding of investigation into the practices of carriers with respect to the form and substance, and the issuance, transfer, and surrender of bills of lading was instituted by the Commission upon its own motion and is, in effect, a resumption or continuation of the former proceeding in which the Commission made and published a report, In the Matter of Bills of Lading, 13 I. C. C., 346. The general subject of bills of lading and of the desirability of uniform bills has been before the Commission in one form or another several times

within the last few years, but notwithstanding authoritative approval by this Commission and general approval by shipping interests of the idea of a uniform bill of lading for use on lines of all carriers subject to the act to regulate commerce, efforts to secure the universal adoption and use of such an instrument have failed, so far, of the fullest measure of success, principally because the interests of some carriers, or shippers, or both, or circumstances and conditions peculiar to particular kinds of traffic, or localities, or sections of the country, have appeared to those respective interests to require special consideration in, or forms of, bills. During the period following the enactment of the so-called Carmack amendment to the act to regulate commerce in 1906 down to the enactment of the first Cummins amendment in 1915, several cases came before the Supreme Court of the United States involving questions of interpretation and validity of conditions and provisions in bills of lading, in which the court sustained the contractual limitations of carrier's liability. One of these was the leading case of Adams Express Co. v. Croninger, 226 U. S., 491. Following the decision in that case there was a distinct change of policy on the part of carriers, generally, in the adjustment of claims made upon them for loss, damage, or injury to property. From a former policy of compromise, of making the best terms possible with the claimant, which was not wholly disadvantageous to the claimant in many instances, and which, of course, was often discriminatory in its operation, a disposition was developed upon the part of many carriers to stand uncompromisingly upon their rights as defined in the bill of lading. Other important decisions of the Supreme Court during this period are Kansas Southern Ry. v. Carl, 227 U. S., 639; Mo., Kans. & Tex. Ry. v. Harriman, 227 U. S., 657, and Boston & Maine Rd. v. Hooker, 233 U. S.., 97, in which latter case it was held that regulations of tariffs filed with the Commission containing provisions respecting limitations of the carrier's liability were presumed to be a part of the transportaton contract and, as such, binding upon both carrier and shipper. Perhaps the most extreme application of the doctrine was in the case of Pierce Co. v. Wells, Fargo & Co., 236 U. S., 278, in which the court held that under the law (the interpretation of the Carmack amendment being involved) a

shipper of a carload of automobiles in interstate commerce who had deliberately and purposely, and with full knowledge of the limitation, and for the purpose of securing a lower rate, accepted an express receipt limiting recovery to $50, unless a greater value was declared, could not recover more than the value stated. The effect of this decision was to hold that a limitation of liability in the bill of lading was valid even though the amount stated was purely arbitrary, the court saying, 'The legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property.' A few days subsequent to the decision in the latter case Congress adopted the so-called first Cummins amendment to the act, which changed the Carmack amendment and imposed liability upon the carrier for 'the full actual loss, damage, or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery,' whatsoever, whether expressed in the bill of lading or otherwise. These amendments had the further effect of withdrawing from the states all regulatory authority and jurisdiction over questions of loss, damage, or injury to property shipped in interstate commerce and of bringing such matters under the uniform operation and regulation of federal law. During this period numerous complaints alleging varying and unfair practices of carriers in the interpretation and application of the rules and regulations of their bills of lading continued to be received by the Commission. The great importance of the bill of lading, not only in transportation usage but as an assignable and negotiable instrument in everyday commercial affairs and transactions, constantly became more evident, tending to accentuate the long recognized necessity for a uniform bill of lading and conformity on the part of carriers to common practices thereunder. The situation described, and the uncertainty in which shippers, carriers, and other interests frequently found themselves involved, made it imperative for the Commission to take action for the purpose of formulating and prescribing uniform bills of lading, if it should prove practicable to do so. Such action was taken through the medium of this proceeding. The principal questions presented here, as well as in the cases coming before the courts, revolve around the efforts of the carrier in case of loss, damage, or injury to

the goods transported by contract to limit its liability in accordance with the terms and conditions stated in its bills of lading. These facts justify some general observations, elementary, even, in their character, upon the nature of the carrier's liability, and the purpose and function of bills of lading; the application of the federal statutory and the common law to them, and a brief review of this and former proceedings before the Commission touching the subject in general or in particular.

Liability of Common Carriers Under the Common Law. "In the celebrated case of Coggs v. Bernard, 2 Lord Raymond, 909; 1 Smith's Leading Cases, 369, Lord Holt, in quaint language, states the common-law liability of carriers as of that time to be that if 'a delivery to carry or otherwise manage, * * * ' is made 'to one that exercises a public employment, * * * and he is to have a reward, he is bound to answer for the goods at all events. * * * The law charges this person thus intrusted to carry goods, against all events, but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of ondoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.' Under the common law as it has been developed to the present day in its application to modern transportation conditions and practices, there has been little or no relaxation of the rigor of the rule of the common carrier's liability, but the exceptions have been extended to include loss, damage, and injury due to other causes, and a common carrier is now regarded as an insurer of the goods intrusted to its care and custody for transportation and as liable for all loss, damage, or injury occuring to the goods while they are held by it in its capacity of a common carrier, except when such loss, damage, or injury is caused by (a) the act

of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods. Generally a common carrier can not, under the common law, exempt itself from the consequences of its own negligence or willful act at any time or under any circumstances in the handling of goods and, therefore, even when loss is occasioned by or results from one of the excepted perils against which it is not otherwise held as an insurer, it will nevertheles be liable for any failure to use the degree of care that would have prevented or minimized losses resulting from the excepted cases. This liability of common carriers as insurers of the goods they transport is thus shown to inhere in the peculiar relationship existing between the carrier and the shipper. The increase in the amount of business done by carriers, the extension of their operations, and the increase in the value of personal property carried from place to place within the United Kingdom, made the degree of the carrier's liability a matter of much concern to carriers in England and they began to contrive ways of diminishing it. In the effort to achieve this end it became the custom of carriers to post notices in public places to the effect that they would not assume liability in excess of specified values for goods unless the owner should pay a higher rate in classification thereof. It was the theory that if such a notice were brought home to the shipper in such manner that he had knowledge of it, it thereby became a part of the contract of shipment and binding upon him. The English courts of law very early began to give official recognizition to the rights claimed by common carriers to thus restrict their common-law liability and it was first held that even so lax a method as the publishing and posting in public places of notices to that intent and purpose would be sufficient to effect the limitation of the carrier's liability when such notices were brought home to the shipper. The custom, sanctioned by law, which thus grew up in England, was productive of so many evils that in 1854 the Parliament intervened and enacted the railway and canal traffic act. After the enactment of that statute common carriers in England could limit their common-law ability only by a contract with the shipper. nI this country, however, the rule was early established that a limitation of the carrier's liability could be

effected only by the establishment of a contractual relationsh between the carrier and shipper and that a notice of limitatic of liability such as was at one time recognized by the Engli courts was ineffectual and could not be relied upon as a defen in an action for recovery on account of loss or damage to tl goods unless the shipper first had notice of the terms and assent to them. Once assented to by the shipper a contract was a sumed to be created that would be binding upon him. The for of such an assent is now commonly secured by the giving ar accepting of a written bill of lading, assent on the part of tl shipper being presumed even though, as is unquestionably tl fact, he seldom reads and is, perhaps, actually ignorant of tl conditions. So, the law is now well settled, both in this countr and in England, that a carrier may, unless forbidden by statut limit or restrict, or even extend and enlarge, its common-la liability. Such contracts must, however, be invested with a the requirements of validity attaching to other forms of cor tract. Mutual assent and a valuable consideration must exi to support the assumption by the carrier of more than it common-law risks or, on the other hand, to support a restrictio or limitation of those risks. A consideration for the latter usually found in the agreement by the carrier to apply a low or, as it is expressed in the governing freight classifications i effect in this country, 'reduced' rate; and this is a sufficient cor sideration.

"**Nature and Functions of the Bill of Lading.** An in portant function of the bill of lading is to give formal expressic to the stipulations and conditions under which the carrier seel to obtain a modification or limitation of the liability that othe wise would be imposed upon it under the common law. Whi the limitations of the carrier's liability must be agreed to by tl shipper and the agreement be invested with the sanctity of valid contract, neither by common law nor by federal statute this country is any particular form of contract or solemnity execution required. Contracts between shippers and carrie however, are almost invariably evidenced by the more or less fo mal bill of lading, written or printed, which serves three di tinct functions: First, a receipt for the goods; second, a cor tract for their carrage; and, third, documentary evidence

title to the goods. As a receipt for the goods, it recites the place and date of shipment; describes the goods, their quantity, weight, dimensions, identification marks, condition, etc., and sometimes their quality and value. As a contract, the bill names the contracting parties, specifies the rate or charge for transportation, and sets forth the agreement and stipulations with respect to the limitations of the carrier's common-law ability in the case of loss or injury to the goods and other obligations assumed by the parties or matters agreed upon between them. That part of the bill which constitutes a receipt may be treated as distinct from the part incorporating the contractual terms. Porter, Law of Bills of Lading, § 14, citing Myer v. Peck, 1 Tiffany (28 N. Y.), 590; Higgins v. U. S. M. S. S. Co., 3 Blatchf. (U. S. C. C.), 282. Ordinarily parol evidence will not be admitted to vary the terms or legal effect of a bill of lading, considered as a contract between the parties to it, although, it seems, that as a receipt for the goods it may be contradicted by oral testimony. The Delaware, 14 Wall., 579. It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading. The bill of lading is regarded as representative of the goods while they are in the carrier's possession. It is not a negotiable instrument in the common acceptation of the term, but it may be, and frequently is, made negotiable in form and thus becomes invested with peculiar attributes of great practical importance commercially.

Liability of Common Carriers Under the Federal Statutes. "Congress has enacted several statutes in recent years which affect bills of lading in various respects. Except the Harter act, approved July 1, 1893, which applied only to carriers by water, and to which reference will be made later, the first of these was the Carmack amendment to section 20 of the act to regulate commerce, approved June 29, 1906, 34 Stat. L., 595, the material provisions of which read as follows: 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the

lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company frm the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' Prior to the adoption of this amendment the liability of common carriers was determined by the common law or the statutes of the different states. A usual provision incorporated in bills of lading then in use was one which provided that no carrier should be liable for any loss or damage not occurring on its own line. Under this limitation an initial carrier was not liable at common law for loss or damage through the fault of the connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. Each succeeding carrier was the agent of the shipper for the continuance of the transportation. The shipper, or claimant, in an action for recovery on account of loss or damage, was therefore subjected to the inconvenience of ascertaining upon which one of several lines in the through route the loss or damage occurred. This was often impossible of definite ascertainment, and, therefore, a serious handicap to the shipper in the prosecution of his suit. The effect of the Carmack amendment was to hold the initial carrier 'receiving property for transportation from a point in one state to a point in another state' as having contracted for through carriage to the point of destination, using the lines of its connecting carriers as its agents. The amendment took away from such initial carrier its former right to make a contract limiting its liability to loss or damage occurring on its own line, and thus relieved the shipping public of the burden theretofore imposed upon it of proving the particular carrier upon whose line the loss or damage occurred. Atlantic Coast Line v. Riverside Mills, 219 U. S., 186. The carrier was prohibited from mitigating or escaping the duties and liabilities imposed upon it by the amendment by any contract, receipt, rule, or regulation which it might make, or attempt to make, with the shipper. Prior to the decision in the Cron-

inger Case, supra, there had been much conflict in the decisions, both of the federal and state courts, upon the question of validity of conditions in bills of lading which limited or sought to limit the amount of the carrier's liability for loss, damage, and injury to goods transported. The proviso in the amendment had been construed by both federal and state courts to preserve to the shipper the remedies then existing under state laws when the latter were more advantageous to him than the remedy provided by federal law, and so the rules were interpreted differently according to the jurisdiction in which the case arose. The Croninger Case held that it was the purpose of Congress to assume jurisdiction in the fixing of the carrier's liability upon interstate shipments, and thereafter such questions were generally construed in the light of the decision in that case, in which it was held that a contract for transportation containing a stipulation of value to which the carrier's liability was sought to be limited was valid and not in violation of the provision of the act. On March 4, 1915, Congress enacted the first Cummins amendment, so called, which became effective June 2, 1915, 38 Stat. L., 1196. It extended the territorial application of the provisions of the Carmack amendment to the transportation of goods within the territories of the United States, the District of Columbia, or to goods exported to adjacent foreign countries, and also fixed, definitely and rigidly, the liability of the common carrier by a provision making the carrier liable for the full actual loss, damage, or injury caused by it or any of its connections to the goods transported by it, 'notwithstanding any limitations of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.' That amendment provided, however, for a bona fide declaration of value, which was binding upon both parties under the following conditions: 'Provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and

the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law.' Notwithstanding the evident purpose of that amendment to invalidate all limitations or attempted limitations of liability of carriers for loss, damage, or injury caused by them, there was much diversity of opinion as to its effect upon rates and upon bill of lading provisions which were at the time in force and effect as published in tariffs on file with the Commission. In response to numerous and urgent requests the Commission conducted an inquiry into some phases of the subject and in its report, The Cummins Amendment, 33 I. C. C., 682, expressed its views, tentatively, upon some of the matters and things presented. It found that there was necessity for revision of bills of lading, livestock contracts, and other similar contracts of carriage, as well as of the classifications and rate schedules; that bills of lading and livestock contracts ought to be at once amended by eliminating obviously unlawful and invalid provisions and permission was given to make such changes effective upon less than statutory notice. The expression of the Commission's views upon these matters was made with the express reservation that the questions were subject to judicial interpretation and that its views might be somewhat changed in the light of later developments and more complete information. By the second Cummins Amendment, 39 Stat. L., 441, effective August 9, 1916, the proviso of the first amendment relating to goods hidden from view by wrapping, boxing, etc., was eliminated and the following language substituted in place thereof: 'The provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, * * * to property except ordinary livestock, received for transportation concerning which the

carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.' The effect of the latter amendment is to permit limitations of liability, or the amount of recovery, and the establishment and maintenance, under the prescribed conditions, of rates dependent upon values declared in writing by the shipper, or agreed upon in writing as the released value of the property, in respect of all property except 'ordinary livestock,' which, as explained in the amendment, is still subject to the rigorous inhibitions against limitations of the carrier's liability contained in the first Cummins amendment. These conditions, as they affect livestock, will be discussed later in a supplemental report dealing with the livestock contract or bill of lading. With respect to all property other than ordinary livestock, unless the carrier shall have been or shall be expressly authorized or required by the Commission to establish and maintain rates dependent upon a written declaration or agreement as to value, the provisions of the first Cummins amendment are still applicable. That rates dependent upon value may be permitted and that the parties may be free to make declarations or agreements in respect of the value of goods, it is provided that such declarations or agreements shall have no other

effect than to limit liability and recovery to an amount not exceeding the value stated and shall not be deemed to be in violation of section 10 of the act."

4. **Issuance of Bill of Lading in General.** What is the contract between the shipper and carrier? It is well settled that under the Interstate Commerce Act it is not the bill of lading alone which constitutes the contract between the shipper and the carrier, but it is the bill of lading, plus the schedule and tariffs filed as required by law.[5] This contract covers not only the charges of the tariff and liability for transportation, but also covers services at the terminal, including unloading and storing.[6] Now, a bill of lading is at once a receipt and a contract. In

5. American Sugar Refining Co. v. D. L. & W. R. R. Co., 207 Fed. 733, 125 C. C. A. 251; D'Utassy v. Sou. Pac. Co., 161 N. Y. S. 222.

6. In re Arlington Hotel Co. (Del. 1916), 98 Atl. 187, the court said:

"It is clear, of course, that the bill of lading constitutes the contract not only respecting the charges for carriage, but also for services at the terminal, including unloading and storing the property transported by the carrier, and by it these charges must be paid by the 'owner or consignee.' It is also clear that the amount of these charges must be those fixed by the carrier in the schedule filed with the Interstate Commerce Commission * * *."

Occasionally the question arises between the shipper and consignee as to whom belongs the original bill of lading.

Since the bill of lading as an indicia of ownership is analogous to a warehouse receipt or bill of sale, it rightfully belongs to the owner of the goods. On goods sold f.o.b. point of shipment, title passes to the consignee upon delivery to the carrier, therefore in such instances, once the goods are received by the carrier, the bill of lading belongs to and should be forwarded to the consignee. On goods sold f.o.b. destination, title does not pass until arrival at destination, therefore in such cases the bill of lading belongs to the consignee when he accepts the goods and therefore should be forwarded to him so as to arrive simultaneously with the goods. The foregoing are subject to this qualification. For goods sold for cash title does not pass until the goods are paid for, therefore in such a case the consignee is not entitled to the bill of lading until he pays for the goods.

The right of the consignee to demand of the consignor the original bill of lading depends upon two things.

1. The title to the goods.
2. The contract between the consignor and consignee.

Two persons can contract to do anything they desire, provided it is not prohibited by law. In the absence of some provision in a contract

its twofold character of receipt and contract the bill of lading is subject to different rules of conception. Under the Cummins Amendment, it is the duty of the carrier to issue a bill of lading, and it cannot refuse to do this.[8]

5. Necessity of Issuing Bill of Lading. Although the law expressly requires a common carrier to issue a receipt or bill of lading for goods accepted for transportation from one state into another, it is not necessary to the right of the shipper to recover for loss or damage to his shipment that it do so.[10]

referring to the possession of the bill of lading, the consignee is entitled to demand the bill of lading whenever he takes title to the goods. When he takes title depends upon the terms of the sale. By contract he may be given the right to demand the bill of lading before he takes title. For instance, take the case of a sale of goods, f.o.b. destination, cash on arrival. Now the consignee is not entitled to the bill of lading until he pays for the goods, but the contract may provide that he is to take possession of the goods and inspect them and of course in such a case he would be entitled to the bill of lading in order to enable him to carry out the contract. Of course, when bills of lading are issued in duplicate, under terms of which, such as certain kinds of non-negotiable bills, it may be the consignee is not entitled to the original. Since, however, in many states it is made a severe offense for the consignor to deliver goods without the original bill of lading, it may be understood that with negotiable bills of lading the original bill should follow the title of the property.

8. In Panhandle & S. F. R. Co. v. Bell (Tex. 1916), 189 S. W. 1097, the court said, p. 1099:

In Panhandle & S. F. R. Co. v. Bell (Tex. 1916), 189 S. W. 1097, the court said, p. 1099:

"One of the dominating features of the Carmack Amendment is the prescribed issuance by the carrier to the shipper of a written bill of lading or receipt, for the goods by the initial carrier. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 151, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257."

10. In John Vittuci Co. v. Can. Pac. Ry., 238 Fed. 1005, the court said, p. 1006:

In John Vittuce Co. v. Can. Pac. Ry, 238 Fed. 1005, the court said, p. 1006:

"An oral contract for the transportation of commodities may be made. Mobile & Montgomery Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; The Jeannie (D. C.), 225 Fed. 178. But where it is apparent upon the face of the complaint that a bill of lading was issued for the transportation of the commodities, the presumption is that the contract was merged in the bill of lading, which must be the basis of the plaintiff's rights, unless there is some fact pleaded to negative such presumption."

The rule has been said to be, that in the absence of a statutory rule or express stipulations between the parties, the carrier's primary liability does not depend upon whether a bill

Under the Interstate Commerce Act declaring that every common carrier receiving property for transportation from a point in one state to a point in another shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder for any loss, the failure of a common carrier to issue the receipt provided is not, with respect to injury to an interstate shipment, any defense. C. & O. Ry. v. Jordan (Ind. 1916), 114 N. E. 461.

Claimant sent sheep from Medford, Indiana, to Chicago, Illinois. The carrier failed to issue any bill of lading for the shipment, delayed the same in transit, and kept the sheep for 57 consecutive hours without food, water or rest in violation of the 28-hour law. Held, that the Interstate Commerce Act clearly imposed on the carrier the duty of issuing a bill of lading, and it could not shield itself from liability by failure to discharge the statutory duty. The shipments were unreasonably delayed in transit, for which negligence the carrier was liable, and it could not claim a limitation of liability by reason of a provision carried in its uniform live stock contract when such contract was not delivered to the shipper until three months after the shipment had moved, and that the live stock contract so issued was without consideration and its various provisions not binding upon the shipper. C. & O. Ry. Co. v. Jordan, *Supra.*

If a bill of lading is not furnished the shipper until after the goods are fully accepted by the carrier under an oral arrangement, the bill of lading constitutes no part of the contract and the oral agreement governs. C. & O. Ry. v. Jordan, *Supra.*

In John Vittuci Co. v. Canadian Pac. Ry. Co., 238 Fed. 1005, the court said, p. 1006:

"A bill of lading is a contract to transport and deliver the goods to the consignee upon the terms therein specified. The Supreme Court of the United States, in The Delaware, 81 U. S. (14 Wall.) 579, at page 601, 20 L. Ed. 779, speaking of a bill of lading, said: 'Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated.' The Circuit Court of Appeals of the Second Circuit (Vanderbilt v. Ocean S. S. Co., 215 Fed. 886, 132 C. C. A. 226), speaking through Judge Rogers, said: 'A bill of lading has a twofold character. It is a contract to transport and deliver the goods to the consignee upon the terms specified in it; and it is also a receipt as to the quantity and description of the goods shipped. So far as it em-

of lading has been issued, but upon whether there has been a complete delivery by the owner of the goods to the carrier for the purpose of transportation.[11] The rule as it now exists has been well stated by the Supreme Court of North Carolina in Davis v. Southport & S. R. R., 90 S. E. 123, where the court says, p. 124: "The act of Congress, amending section 20, Interstate Commerce Act, approved June 29, 1906, and appearing in 34 United States Statutes, c. 3591, § 7, was enacted chiefly for the purpose of imposing on the initial carrier responsibility for the entire carriage of an interstate shipment; and while it requires the issuance of a bill of lading in evidence of such contract and responsibility, there is nothing inhibitive in its terms or purpose. The requirement for a bill of lading is imposed primarily for the benefit of the shpper, and, in our opinion, it does not, and was not intended to relieve the carrier from liability who may have entered into a contract of shipment without it. A position not dissimilar has been approved and applied with us in several cases against insurance companies where a policy issued in violation of some requirement, established for the protection of the policy holder only, was held a binding obligation on the com-

bodies the terms of the contract, it is not to be varied by parol evidence.' A bill of lading is a contract for the carriage of goods reduced to writing, and is the only evidence of the contract." Also see Barrett v. N. Pac. Ry. (Idaho 1916), 157 Pac. 1916.

While a bill of lading is the usual evidence of a contract of shipment with a common carrier by rail, and such carrier is usually required to issue one on demand, it is not essential to a contract. Davis v. Norfolk & S. R. R. (N. C. 1916), 90 S. E. R. 123.

A contract for the transportation of commodities may be oral. John Vittuci Co. v. Canadian Pac. Ry Co., 238 Fed. 1005.

It will be presumed that any oral negotiations respecting the terms or conditions upon which goods are received, the route, and the rate, are merged in the bill of lading. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

The written contract for an interstate shipment, contemplated by the Carmack Amendment, being free from fraud, prevails over the precedent oral contract, so that provision of the written contract for notice of claim of damages, if reasonable, controls. Panhandle & S. F. Ry. Co. v. Bell (Tex. 1916), 189 S. W. 1097.

11. Knapp v. Minneapolis, St. P. & S. Ste. M. Ry. (No. Dak. 1916), 159 N. W. 81.

pany, and recovery thereon was sustained." While, therefore, the issuance of a bill of lading is not necessary to charge the carrier as such with liability, nevertheless, the relation of shipper and carrier does not occur until property has been delivered and accepted by the carrier for immediate tansportation. When the goods are not to be transported until further ordered, a carrier is only a depositary, or bailee.[12] However, while a bill of lading or other receipt is not ordinarily essential to a complete delivery, such instrument, when issued by an authorized agent of the carrier, is always competent evidence, tending to prove that the property therein described was delivered to such carrier for shipment.[13] After the bill of lading has been issued and signed by the carrier the carrier has no further authority to add or take away anything from the contract thus made. Therefore, words written on the bill of lading without the consent or direction of the shipper, are no part of the contract.[14] Recently, quite a few cases have come up in which the carriers have sought to evade liability because no bill of lading was issued. This presents a remarkable situation. The Interstate Commerce Act expressly imposes upon a carrier the duty to issue a bill of lading.

12. Wilson. v. International Ry. Co., 160 N. Y. S. 367.

13. Knapp v. Minneapolis, St. P. & S. Ste. M. Ry. Co. (No. Dak. 1916), 159 N. W. 81.

14. Cincinnati, N. O. & T. R. Ry. v. Luke (Ky. 1916), 186 S. W. 875.

Where a tariff and bill of lading did not confer on a shipper the right to designate the plant to compress his cotton shipped in plantation bales, the fact that he wrote on the bill of lading "To be compressed at Cleveland Compress Co., Houston, Texas," was not such stopping and holding of property in transit upon the request of the shipper as to relieve the carrier from liability for the destruction of the cotton at the designated compress plant. D'Utassy v. So. Pac. Co., 161 N. Y. S. 22.

The shipper of an interstate shipment is charged with knowledge of the law that a written bill of lading will be issued, which will include all terms and conditions of the transportation, that there were tariff rates fixed, and that they must include the rate for the entire transportation and that there was a lower and a higher rate. Atchison, T. & S. F. Ry. Co. v. Smith (Tex. 1916), 189 S. W. 70.

A receipt issued by an express company for an interstate shipment, setting out the precise terms under which the carrier undertakes to transport the goods, constitutes, when accepted by the consignor, a contract between the parties and the consignor will be bound by the reasonable stipulations therein. See Adams

It is a criminal offense not to comply with this law. In the cases mentioned, the carrier seeks to put itself in the position of one desiring to be relieved from further liability because it has committed a criminal offense. The mere fact that it disobeys the law in one respect is urged as a defense to its negligence in another. To allow such a contention would be monstrous. The Supreme Court of the United States has said that it must be presumed that a carrier is conducting its business lawfully.[15] Surely it is not the province of a shipper to usurp the functions of the carrier and act as its guardian. Once it has given its goods to the carrier for transportation, the shipper should be allowed to rest secure in the knowledge that their future care will be lawful, such as the express provisions of the law place upon the carrier. If the carrier chooses to disobey, there is certainly no possible theory upon which the shipper, not a party whose disobedience or negligence causes the loss, can be penalized. The relationship of carrier and shipper may be created without any written bill of lading.[16] But a mere memorandum stating that a

Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Lynch v. Southern Express Co. (Ga. 1916), 90 S. E. 655.

A shipper of livestock is precluded from contending that his shipment was not made under the bill of lading in view of his signature thereto and the Carmack Amendment, requiring a written contract of shipment. Johnson v. Missouri Pac. Ry. Co. (Mo. 1916), 187 S. W. 282.

15. A state court has recently emphasized this: In a shipper's action for damages in transit, where plaintiff affirmatively alleged, as matter on which its cause of action was based, that a bill of lading was issued for the shipment and delivered to it, which was denied by the answer, for proof of issuance of the bill plaintiff cannot substitute the presumption that since the Carmack Amendment directs that a bill of lading will be issued by the initial carrier, it will be presumed that it did its duty, and one was issued. Cudahy Packing Co. v. C. & N. W. Ry. (Mo. 1917), 196 S. W. 406.

16. McRary v. Southern Ry. Co. (N. C. 1917), 94 S. E. 107.

In an action for loss of furniture shipped, a memorandum acknowledging that a bill of lading had been issued, but beginning with the statement that it was not the original bill of lading, nor a copy or duplicate covering the property named, but intended solely for filing, and having prefaced to the signature thereof the statement that the signature acknowledges only the amount prepaid, could only, at most, be considered a receipt for so much money prepaid on the shipment. Mc-

bill of lading has not been issued cannot be held to take the place of the bill of lading and bind claimant to such terms as might be in such bill of lading.[17] Therefore an interstate carrier is liable in the same measure for damage to a shipment, though it failed to issue the bill of lading prescribed by federal law, and the contract will be the same notwithstanding oral agreements.[18]

Rary v. Southern Ry. Co. (N. C. 1917), 94 S. E. 107.

A carrier accepting goods for interstate shipment is liable for their loss, and though, in violation of the Hepburn Act, no receipt or bill of lading was issued, and though the Interstate Commerce Act, of which the Hepburn Act is amendatory by section 10, imposes a penalty on the carrier for noncompliance with its requirements. Dionne v. Am. Exp. Co. (Vt. 1917), 101 Atl. 209.

On the issue whether or not a carrier's agent accepted goods for transportation, though he did not issue a receipt, exclusion of evidence under the carrier's offer to show by him that he never accepted matter for transportation without issuing a receipt was proper. Dionne v. Am. Exp. Co. (Vt. 1917), 101 Atl. 209.

17. McRary v. Southern Ry. Co. (N. C. 1917), 94 S. E. 107.

18. Bryan v. L. & N. R. Co. (N. C. 1917), 93 S. E. 750. Also see, Davis v. Norfolk So. Ry. (N. C. 1916), 90 S. E. 123; Aradelon v. N. Y N. H. & H. R. R. (Mass. 1916), 114 N. E. 297. Also see Note 10, supra.

In Cudahy Packing Co. v. C. & N. W. Ry. Co. (Mo. 1917), 196 S. W. 406, the court said, p. 407:

"That part of the Carmack Amendment to the Interstate Act, applicable (section 20), reads as follows:

"'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'

"It must be conceded that the words used in this section are of a mandatory character, and defendant contends that they are emphasized by the language used in decisions of the Superior Court of the United States, especially Adams Exp. Co. v. Croninger, 226 U. S. 491; 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. At page 504 of the opinion in that case (33 Sup. Ct. 151) it is said that one of the "dominating features of that amendment" is that:

"It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor,' when it receives 'property for transportation from a

Under the Carmack amendment, requiring the carrier to issue a bill of lading, the terms of which are fixed by the Interstate Commerce Commission, an interstate carrier had no authority to enter into any other than the uniform contract for a livestock shipment.[19] An interstate shipment, whether originating in this country or abroad, is controlled, so far as concerns the portion of the transportation which is interstate, by the Interstate Commerce Act, and rules, forms of contracts, and classifications established in pursuance of such law; so that a shipment from Yokohama to New York in respect to its transportation by rail from San Francisco, the shipper having given no notice that he elected to ship subject to the common-law rules of liability, must be deemed to have been made under the filed clasification and rates, and under the terms of the uniform bill of lading, though no such bill was in fact issued or signed.[20] The mere fact

point in one state to a point in another'. At page 505 (33 Sup. Ct. 152) is found the expression that: It (the Carmack Amendment) embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract.

At page 506 (33 Sup. Ct. 152) it is said:

The duty to issue a bill of lading, and the liability thereby assumed, are covered in full, etc.

And at page 507 (33 Sup. Ct. 152), in speaking of the proviso clause of the section which continues existing remedies and rights of action, whether under state statutes or the common law, limits such remedies and rights, thus continued, to such as are not inconsistent with the provisions of the act. To this may be added the recent case of Pennsylvania R. R. Co. v. Olivit Bros., 243 U.S.574, 34 Sup. Ct. 468, 62 L. Ed.—, decided by that court April 30, 1917. If verbal contracts for interstate shipments may be made and enforced under the interstate law, will not uniformity cease? And will not full room be left for discrimination and thus the principal feature of the statute be destroyed? If a shipper desires the remedy and the protection provided by that statute, should he not demand a bill of lading? However, it has been ruled by several state courts, in line with plaintiff's suggestion, that the issuance of a bill of lading is "a mere detail requirement," and is not necessary to interstate law. Aton Piano Co. v. Railroad, 152 Wisc. 156, 139 N. W. 743; Gamble-Robinson Co. v. Union Pac. Ry. Co., 262 Ill. 400, 405, 104 N. E. 666, Ann. Cas. 1915B, 89; International Watch Co. v. Delaware, Lackawanna & W. Ry. Co., 80 N. J. Law 553, 556, 78 Atl. 49."

19. Bryan v. L. & N. R. Co. (N. C. 1917), 93 S. E. 750.

20. Burke v. U. P. R. Co., 166 N. Y. S. 100.

that there may be slight defects in a shipping receipt or bill of lading cannot change the liability of the carrier.[21]

6. Characteristics of Bill of Lading. A "bill of lading," in essential characteristics, is a receipt for the thing to be shipped and an agreement to transport.[22] A bill of lading indorsed in blank invests the party to whom it is delivered with title to the goods covered thereby, nothing further appearing.[23] In A. C. L. R. Co. v. Luke & Fleming (Ga. 1917), 93 S. E. 286, the court said, pp. 287, 288: "As the plaintiff in error specially urges that, because the railroad delivered to the assignees of the bill of lading 'all and the very same cotton it received from the shipper,' it should be relieved of liability, especially as the bill of lading had in it the words, 'Weight subject to correction,' and 'it was only quasi negotiable, that is, assignable as to the property itself, not as to the quality of the goods,' we will discuss this proposition only. A bill of lading is not strictly a negotiable instrument, but rather a symbol or representatve of the goods themselves."

7. Recitals in Bill of Lading. Bills of lading contain various provisions concerning quantity and quality of the goods. Thus the uniform bill of lading states that the shipment is received "in apparent good order." The recital is not conclusive, but it may be shown as a matter of fact, that the property was not in good order, and this may be proven by parole evidence. While it is true that certain courts have said the bill of lading is the contract of transportation, it is nevertheless, so far as the recitals

21. A contract covering a shipment of horses was not defective because unfilled and incomplete in certain places, among them omitting the name of the shipper from the heading, reading, "This agreement made this day of 10-2-1912, and by and between the Boston & Maine Railroad, hereinafter called the carrier, and, hereafter called the shipper," etc. Fletcher v. New York Cent. & H. R. Co. (Mass. 1918), 118 N. E. 294.

22. Central R. R. of N. J. v. Berry, 165 N. Y. S. 1041.

Provisions in a bill of lading, in cases where there is a reasonable doubt as to their meaning, are to be construed most strongly against the carrier. 10 C. J. 181, 194. McElwain v. U. P. Ry. Co. (Neb. 1917), 163 N. W. 845.

23. C. R. I. & P. Ry. Co. v. McElhany (Ia. 1917), 165 N. W. 67.

concerning the quantity or quality of the shipment itself is concerned, only a receipt for the goods, and, as such, it may be explained, varied or contradicted, according to what are the true facts of the case. If, in fact the quantity stated has not been received, the carrier has a right to show this. Contradicting the recitals in the bill of lading, so far as it acts as a receipt, is not varying the terms of a written contract, because so far as these recitals go, the bill of lading is looked upon as a receipt rather than a contract. But while parole or other evidence is admissible to show the true quantity of goods shipped or their true quality, such evidence is not admissible to vary the terms of the bill of lading so far as it acts as a contract of transportation. Two reasons may be assigned for this. One is that the conditions of the bill of lading are carried in the filed tariffs of the carriers, and under the Interstate Commerce Act, are binding upon both the carrier and shipper. To permit the conditions of the bill of lading to be varied, would, therefore, be sanctioning a special contract, which is prohibited by the federal law. The other view is that the bill of lading is a written contract, and it is inadmissible to vary the terms of such a contract by exterior evidence.

Shipper's Load and Count Notation. Very often a bill of lading contains a notation such as "shipper's load and count." This means the shipper had loaded and counted the contents of the car. In case of shortage, it is often contended that the carrier is not liable because of this notation. Such is not the case. If the shipper, by competent testimony, such as its loading clerks, can show what has been received, the carrier must make good the difference. And the bill of lading is always prima facie evidence of what has been shipped. The recent Bill of Lading Act, which went into effect January 1, 1917, covers this situation thoroughly, and clears up any ambiguity which might exist, although it is not probable that the Supreme Court of the United States would ever have held that the words "shipper's load and count" relieved the carrier of liability for any shortage. At the most, it would seem that this provision in a bill of lading is only evidence that the shipper has loaded the car, and in the event any damage is suffered, due to defective packing

or loading, the carrier could not be held responsible. Therefore this legislation has only placed in statutory form what should have been considered the prior law. The pertinent provisions of the Act are as follows: "Sec. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, 'Shipper's weight, load, and count,' or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. Sec. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill of lading the words 'Shipper's weight, load and count,' or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading. Provided, however, Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to

do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words 'Shipper's weight,' or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."[24] Negotiable

24. In the case of Ponchatoula Farmers' Asso., Limited, v. I. C. C. R. R. Co., 19 C. C. 513, the Interstate Commerce Commission refused to make any recommendation concerning the practice of receipting for shipments at shipper's load and count; although it intimated that the practice might not be unreasonable as applied to shipments of perishable produce.

This is significant in view of the fact that the Commission has jurisdiction over the provisions of bills of lading governing interstate shipments.

Moore on Carriers (2nd. ed.) says: (192 et seq.)

"It is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and it cannot, generally, devolve this duty by any regulation upon the shipper; it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars.

London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752, 61 Am. & Eng. R. Cas. 225, affg. 68 Hun. (N. Y.), App. 231.

Doan v. St. Louis, etc., R. Co., 38 Mo. App. 408.

Where, by the contract of carriage, the shipper undertakes to load the freight into the cars or vessel, this does not constitute such an interference by the shipper with the carrier's exclusive possession and control as to postpone the time when the carrier takes on the character of a common carrier, and the carrier's liability attaches at the time the freight is offered for carriage and accepted, although the loading of the freight remains to be done by the shipper.

London, etc., Fire Ins. Co. v. Rome, etc., R. Co., *Supra;* Fitchburg, etc., R. Co. v. Hanna, 72 Mass. (6 Gray), 539, 66 Am. Dec., 427; Merritt v. Old Colony, etc., R. Co., 93 Mass. (11 Allen) 80; Bulkley v. Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. Ed. 599; The Bark Edwin, 1 Sprague (U. S.), 477; The Oregon, Deady (U. S.), 179; Grant v. Norway, 2 Eng. L. & Eq. 337, 10 C. B. 665, 70 E. C. L. 665, 15 Jur. 296; Greenwood v. Cooper, 10 La. Ann. 796; Hannibal, etc., R. Co. v. Swift, 79 U. S. (12 Wall) 262, 20 L. Ed., 423."

It is of course elementary that the recitals as to quantity contained in the bill of lading are only prima facie, and may be shown to be incorrect in fact. Proctically, however, if the shipper uses care

bills of lading, in so far as they are receipts, may be explained or contradicted.[25]. Negotiable bills of lading as contracts for the carriage of property are to be construed according to their terms.[26] A carrier has no right in issuing a bill of lading to attempt to make untruthful and impossible statements a part of such document. So a carrier cannot compel the shipper to sign

in loading and has the carload properly checked by some competent person who can make affidavit as to the exact contents, it is impossible for the carrier to overcome the recitals in the bill of lading. If just before the car is turned over to the railroad, or the railroad notified that it is ready for delivery, a checker examines the car, so that he can make affidavit as to the number of sacks which it contains and immediately his inspection is finished he signs a memorandum, and retains this for the shippers' filer under these circumstances, it would be impossible for the carrier to successfully controvert any claim for overcharge, or the like which might subsequently be made on that particular car.

On account of the wide spread practice of the carriers in requiring shippers of carload commodities to count their freight, it is problematical whether the Commission would issue an order changing this practice, although it may be the absolute duty of carriers, upon request, and irrespective of what the practice is, to count freight and issue a receipt for the exact amount of commodity tendered for transportation.

It seems that the stamping of the words, "shippers load and count," on the bill of lading, is a useless procedure, and does not effect the substantial legal rights of the shipper.

25. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

26. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

The transferee of negotiable bills of lading for value becomes the owner of the shipment. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

In Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210, the court said, p. 213:

"Such bills, in so far as they are receipts, may be explained or contradicted; but, as contracts for carriage of property, they are to be construed according to their terms. Western A. & R. Co. v. Ohio Valley Bkg. & Tr. Co., 107 Ga. 512, 33 S. E. 821; Little Rock & Co. v. Hall, 32 Ark. 669; Cleveland, C., C. & St. L. R. Ry. v. Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; Merchants' Despatch Transp. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 24 L. R. A. 156. * * *

"It will be presumed that any oral negotiations respecting the terms or conditions upon which the goods are to be received, the route, and rate at which they are to be forwarded, are merged in the bill of lading. 4 Elliott on Railroads, §1423; St. L., I. M. & S. Ry. Co. v. Jones, 93 Ark. 545, 125 S. W. 1025, 137 Am. St. Rep. 99."

a bill of lading for perishable produce stating therein that such produce is more or less frozen, when such is not the fact.[27]

8. Fraudulent or Disputed Bills of Lading. Occasionally disputes arises concerning the authority of a certain agent to issue a bill of lading. Section 22 of the Federal Bill of Lading Act, in effect January 1, 1917, provides that a carrier shall be bound by a bill of lading issued by any employee within the scope of his actual or "apparent" authority. Any innocent holder of such an instrument can recover against the carrier although the bill of lading may call for more goods than the carrier has actually received.[28]

27. Claimant loaded cabbage into cars and the carrier refused to ship them unless the shipper would accept a bill of lading with a notice upon it that the cabbage were "more or less frozen when received." The cabbages were in good condition and were not more or less frozen. *Held,* in any question between the claimant and the company about the condition of the cabbage, this false notation would be some evidence against the claimant. He was not obliged to accept the bill of lading, thus making an admission against himself not warranted by the facts. The requirement of the carrier was therefore unreasonable and arbitrary, and it violated its duty in refusing to ship the cabbage. Claimant was not bound to abandon his effort to ship the cabbage and remove them from the car, as it was defendant's duty to forward them. The carrier shipped the cabbage, not to the destination indicated by the shipper, but to another place, and sold them, as it claimed, on the claimant's account. The claimant, therefore, was entitled to recover their value. Dobbins v. Delaware, L. & W. R. Co., 163 N. Y. S. 849, 850.

A carrier, who diverts and sells cabbage after owner's refusal to accept a bill of lading with notation of unsoundness, where the goods were not in fact unsound, is liable for their value. Dobbins v. Delaware, L. & W. R. Co., 163 N. Y. S. 849.

It is the duty of a carrier to issue a proper bill of lading and ship cabbage loaded on its cars, and an offer to issue a bill with notation, "More or less frozen when received," where such is not the case, is not a fulfillment of such duty. Dobbins v. Delaware, L. & W. R. Co., 163 N. Y. S. 849.

W. L. Hall & Co. v. Norfolk Southern R. Co. (N. Car. 1917), 91 S. E. 607.

28. Although there is a conflict whether a carrier is liable on a fraudulent bill of lading, some courts holding that in the hands of an innocent purchaser, the carrier should be held liable, a very strong case has recently held that a false bill of lading, given by a station agent for goods not actually received was not within the scope of

9. **Agent of Carrier.** A carrier is bound by any act of an agent performed within the scope of his authority. So a carrier receiving from a shipper carloads of strawberries in good condition, whose agent was authorized to issue a bill of lading changing the destination of the shipment, was bound by the terms of such bill of lading.[29] So where negotiable bills of lading contained nothing that would put the transferee on notice that the shipments would not take the usual route as designated therein, and where the notation by the carrier's agent indicated that, notwithstanding the shipment had been originally billed to a certain point, it had been diverted therefrom, the transferee had the right to rely upon the bills of lading in making his purchase.[30] But a railroad's agent at one station had no authority to bind the road on account of business to be transacted at another station, unless specifically authorized so to do, or unless his act was thereafter ratified.[31] The fact that cotton had been previously delivered by conecting carriers upon spuri-

his authority and conferred no rights. Fitch & Co. v. A. T. & S. F. Ry., 155 N. Y. S. 1079, and see Churchill v. Grand Trunk Western Ry. (Mich. 1915), 154 N. W. 106; Guaranty Trust Co. v. M. & O. R. R. (Miss. 1916), 70 So. 585.

29. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

30. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

31. Strommer v. Chicago, M. & St. P. Ry. Co. (S. Dak. 1917), 161 N. W. 346.

In Panhandle & S. F. Ry. Co. v. Bell (Tex. 1916), 189 S. W. 1097, the court said, pp. 1098, 1099:

"Because the initial carrier receives goods marked for transportation beyond its own line or quotes the rate of freight over the whole distance, or because previous to the shipment there was proof of one shipment over the same road to the point of destination and arrangements for cars and rates, and the fact that through freight was collected at the destination, are insufficient to prove authority on the part of the local agent to make a contract to transport over other lines of road. Blackburn v. Railway Co., 52 Tex. Civ. App. 444, 445, 115 S. W. 874 (writ of error refused); Hunter v. Railway, 76 Tex. 196, 13 S. W. 190; also Miller v. Texas & N. O. Ry. Co., 83 Tex. 519, 18 S. W. 954, and Gulf, C. & S. F. Ry. Co. v. Baird, 75 Tex. 259, 12 S. W. 530; Hutchinson on Carriers, §§ 145, 170.

"The Supreme Court of the United States, in the case of Railway Co. v. Myrick, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325, held that an agreement for through transportation will not be inferred from doubtful expressions or loose language, and

ous bills of lading of the carrier does not show that the issuance of subsequent bills of lading was within the scope of the authority of its agent.[32] Where a carrier shows that merchandise was not actually received by it and that a bill of lading issued by its agent, either through fraud or mistake, is the foundation of a contract to carry and deliver, there can have been no contract of shipment, as such agent has no authority to issue a bill of lading without receipt of the goods, and cannot bind the carrier, even as to an innocent holder of the bill of lading.[33] While the recent Federal Bill of Lading Act provides that a carrier shall be bound by the act of any agent in issuing a bill of lading within the "apparent" scope of his authority, it is silent as to the effect of any contract an agent may try to make, such as one for the furnishing of cars, for instance. The authority of a carrier's agent to make a contract of this kind, therefore, must be judged by the usual rules of the law of agency. A "bill of lading" is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it; and it is the duty of a carrier or its agent, issuing a bill of lading, for those products for which it is the

what constitutes a contract of carriage for through transportation was a matter of general law, upon which that court would exercise its own judgment."

32. National Park Bank of N. Y. v. Louisville & N. R. Co. (Ala. 1917), 74 So. 69.

33. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

The fact that a railroad shipper conspired to issue spurious bills of lading upon which the railroad through its business associates procured the delivery at the point of destination of goods subsequently shipped on genuine bills, and on which plaintiff suffered no loss, does not make the carrier liable for loss caused by other spurious bills issued by the shipper on which no shipments were made, and of which it was not shown to have had knowledge, since the issuance of each false bill of lading was a separate criminal offense or cause of civil action. National Park Bank of N. Y. v. Louisville & N. R. Co. (Ala. 1917), 74 So. 69.

The Alabama law does not authorize an agent having power to issue bills of lading for property received to empower third persons not in the carrier's employ or in the prosecution of its business to issue at will bills of lading without receipt of the property to be shipped. National Park Bank of N. Y. v. Louisville & N. R. Co. (Ala. 1917), 74 So. 69.

general custom for shippers to draw drafts upon the consignee or others, with bill of lading attached, to use ordinary care in issuing such bill of lading, in reference to the quantity and description of the product for which such bill of lading is issued.[34] A bill of lading, issued by a carrier upon the receipt of sixty-one bales of "grabbots," describing the same as sixty-one bales of cotton, without any qualifying or modifying terms, is not a correct description of the freight; and, where an innocent person has paid money, relying on the representations contained in such bill, and sustains damages thereby, he may recover from such carrier the moneys so paid.[35]

10. **Power of Agent to Bind Shipper.** Of course, a great deal of shipping is done by shippers through agents, such as transfer companies, shipping clerks and the like, and it sometimes becomes necessary to ascertain whether instructions given by such agents are binding on the shipper, and also on the carrier. As a general rule, of course, any instructions given by a shipper's agent to a carrier not contrary to the law, must be obeyed by the carrier. Whether such instructions can bind the shipper is always a question which must be determined by the scope of the agency, that is, by the authority that such agent had from his principal. The apparent authority of an

34. Chicago, R. I. & P. Ry. v. Cleveland (Okla. 1916), 160 Pac. 328.

A local station agent, as such, has no power, without further authorization, express or implied, to bind his company by a contract to transport goods from places distant from such station and distant from his employer's line of railway, nor has such agent any authority to assume liability for acts of a preceding carrier. Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co. (N. D. 1916), 159 N. W. 81. (Decided prior to the passage of the Bill of Lading Act.)

A traveling fast freight soliciting agent, soliciting freight at points not on the carrier's lines, is a general agent, with power to bind the carrier to furnish cars at such points. Kissell v. Pittsburgh, Ft. W. & C. Ry. (Mo. 1916), 188 S. W. 1118.

A general agency exists when there is a delegation of authority to do all acts connected with a particular employment, and the fact that the authority of an agent is limited to a particular business does not make it special, as it may be as general in regard to that business as though its range were unlimited. Kissell v. Pittsburgh, Ft. W. & C. Ry. Co. (Mo. 1916), 188 S. W. 1118.

35. Chicago, R. I. & P. Ry. Co. v. Cleveland (Okla. 1916), 160 Pac. 328.

agent sufficient to bind the principal is such authority as the agent appears to have by reason of the actual authority which he does have.[36] Even if the agent does not have authority to make the specific contract, nevertheless, the principal can ratify it. So it has been held, that where a shipper sues three times on a contract with a succeeding carrier, alleged to have been signed by his agent without his authority, he ratifies it and could not thereafter affirm that the agent had no authority to sign.[37] A shipper, whose forwarder has violated instructions as to valuation or classification by which he is damaged, has his remedy against the forwarder, but not against the carrier. He is bound by the acts of his agent.[38]. Where a transfer company agreed to ship the goods of plaintiff over a certain route, and took from plaintiff a shipping order limiting the liability of the transfer company, and thereafter the transfer company shipped the goods over a different route to that specified by the shipper, in consequence of which they were burned, held, that the transfer company was liable for the value of the goods less the amount recovered from the railroad company, without regard to the limitation of liability in the shipping order.[39] Of course an agent has power to so bind his principal if it is within the scope of his authority. But the shipper of hay by rail was not bound by any prior unauthorized act of her agent in the premises.[40] However, agency may be established by evidence, circumstancial or otherwise, appropriate to the purpose.[41] In Moler v. L. & N. R.

36. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. (Mo. 1916), 188 S. W. 1118.

Where it appears that a traveling fast freight agent had frequently received requests from a shipper to furnish cars at a point not on the carrier's line, but on a connecting carrier and such cars had been furnished, it will be held that since the scope of the employment of such agent was soliciting freight contracts he will be held to have authority to bind the carrier to furnish cars. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. (Kans. 1916), 188 S. W. 1118.

37. Bowles v. Quincy, O. & K. C. R. R. (Mo. 1916), 187 S. W. 131.

38. Great Nor. Ry. v. O'Connor, 232 U. S. 508.

39. O. K. Transfer Co. v. O'Neill (Okla. 1916), 159 Pac. 272.

40. Barton v. L. & N. R. Co. (Mo. 1917), 196 S. W. 379.

41. Pecos Mfg. Co. v. Southern Exp. Co. (Ala. 1917), 76 So. 29.

Co. (Mo. 1917), 195 S. W. 524, the court said: "The interstate commerce law, known as the Carmack amendment (34 U. S. Stat. at L. 595), provides that a carrier 'shall issue a receipt or bill of lading,' and in making shipments of this kind it is usual and customary that a written receipt or bill of lading be issued, so the parties whom plaintiff made his agents for the purpose of shipping the livestock, certainly acted within the scope of their authority in executing the bills of lading. Great Northern Ry. Co. v. O' Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703; Donovan v. Wells, Fargo & Co., 265 Mo. 201, 177 S. W. 839." Parties directed to ship livestock for the owner have implied authority to do what is ordinarily intrusted to such agents and to execute railroad bills of lading covering the shipment required by the Carmack amendment.[42]

11. **Destruction Before Transportation.** The carrier's liability as an insurer commences as soon as the shipment has been delivered to it. The question as to when this happens is oftentimes a very delicate one to ascertain. The weight of authority seems to be that when the shipment has been placed for delivery in the usual and customary way, the carrier's liability as an insurer begins after a reasonable time for it to take the shipment had ended. Delivery to a carrier can be made at any one of three places, generally speaking. First, of course, delivery at its own terminal or public sidetrack. In such a case it is easy, of course, to ascertain when its liability begins. Once the shipment is unloaded in the terminal or placed on the public sidetrack, the liability of the carrier at once attaches. The second class of cases is where delivery is made to the carrier on the shipper's private track. As we have seen, the weight of authority seems to be that after the car is set for transportation and the carrier notified, it should, within a reasonable time, remove the car, and after such reasonable time has ended its liability as an insurer begins. The custom of dealing between the parties, the facilities of the carrier, are all matters which enter into the determination of what is a reasonable time and, of course, it is for a jury to say what is the period which consti-

42. Moler v. L. & N. R. R. (Mo. 1917), 195 S. W. 524.

tutes a reasonable time. The third class of cases exists where there may be a public team track, but it is located at out of the way junctions or sparsely populated places which have prepaid stations. Of course, it is obvious that when a shipment is placed on a team track in such a locality, the reasonable time within which the carrier must take possession of it may be a longer period than in either of the foregoing instances. It is always a question for a jury as to whether a shipment is tendered to a carrier at such an unreasonably early time as to relieve the carrier of its relation of insurer.[48]

43. McSpadden v. Lusk (Mo. 1916), 186 S. W. 731.

In an action for damages to hogs allowed to have been caused by overheating in carrier's pen before shipment, whether putting them in the pen on the morning of the 18th of the month with the intention on part of claimant not to ship them until the morning of the 19th, there being but one stock train a day at 8 a. m., was an unreasonably early time before shipment relieving carrier of relation of insurer or carrier of freight, held for the jury under the evidence. McSpadden v. Lusk (Mo. 1916), 186 S. W. 173.

If goods were in a car in the possession of a railroad company as a common carrier, and accepted for immediate shipment at the time they were burned, the company was liable as an insurer. Louisville, N. R. Co. v. Edwards' Adm'x. (Ky. 1919), 209.

Where the owners of a cotton gin, located on a railroad spur, in accordance with custom, notified the conductor of a local freight train that they desired a car to load with cotton, which he left on the spur, and the gin owners loaded such car, closing all the doors, the car being destroyed by fire before it could be picked up by the next freight train going in the proper direction, the railroad was not liable for the loss, as there was no delivery to it of the cotton, and could have been none, until the conductor was notified that the car was loaded and ready for immediate shipment, and he had accepted it, either verbally or by issuing a conductor's receipt, according to custom. Matthews v. St. Louis, I. M. & S. Ry. Co. (Ark. 1916), 185 S. W. 461.

Where a shipper of cattle had notified the carrier that he would be ready to load seven cars of cattle at 8 o'clock on a specified morning and had his cattle in the pens when the stock train backed up to load, but had not finished weighing his cattle, and the stock train then took on two cars of cattle belonging to another shipper, and prior to such loading the conductor had talked to employees of the first shipper, and had been told that all the cattle would not be ready for about two hours, and subsequently the stock train then picked up the two cars belonging to the other shipper, and at that time there were three cars of cattle of the first shipper ready to load, but the train proceeded on its way without

12. **Failure of Carrier to Furnish Facilities.** It is, of course, the duty of a carrier to furnish proper facilities for the transaction of its business.[43½] In the first instance the principal facility that a shipper is interested in is the kind and character of car which will be given him for shipment and the promptness with which it will be furnished. If the shipment is of such a character as livestock, for instance, then he may be equally concerned with the kind of pens in which the stock will be confined before being shipped, and the precautions taken to guard the livestock from exposure to contagious diseases. A railroad is under duty to provide sufficient cars to transport without unreasonable delay the usual and ordinary quantity of freight offered to it, which might be ordinarily expected in its business.[44] If a railroad fails to perform its duty in regard to providing facilities for reasonably prompt transportation of freight of the kind and quantity offered to it in the usual course of business, in a suit of damages arising therefrom the mere fact that the company expected to get cars from other railroads and that they refused to let it have such cars because they had an unusual demand therefor would not necessarily relieve it from liability, but the condition of business, the demand for cars, whether usual and ordinary or unusual or extraordinary, what the carrier has done with a view to providing facilities for the usual and ordinary demands of the business and the ability or inability to get cars at the time in question, are facts for the consideration of the jury in

the conductor stopping to inquire whether at that time there were any cattle ready. *Held,* this constituted negligence on the part of the carrier and the evidence clearly shows that the shipper had complied with his order, especially since it appears that all the cattle were ready for loading at 9 o'clock. Blackwell v. Oregon Short Line Ry. (Ore. 1916), 161 Pac. 565.

43½. In Railway Co. v. Pratt, 22 Wallace 123, the Supreme Court of the United States was asked to pass upon the obligation of a carrier to furnish proper cars for the shipment of live stock, namely, horses. The court held that it was the duty of a carrier to furnish suitable vehicles for transportation and that if it furnished unfit or unsafe vehicles it is not exempt from responsibility by the fact that the shipper knew them to be defective and used them.

Also see C. R. I. & P. Ry. v. Lawton Ref. Co., 253 Fed. 705.

44. Wadley Sou. Ry. v. Kent & Downs (Ga. 1916), 89 S. E. 765.

determining whether the carrier has complied with its duty.[45] The size of the car is often a matter of considerable importance. Now, there may be conditions of such an unusual character that a railroad company is not bound, under its general duty as a common carrier, to provide unusual cars or special facilities for transportation. But if, in the ordinary course of its business it is acustomed to receive lumber, for instance, which requires cars forty feet in length, for transportation, and holds itself out as a common carrier thereof, its duty to furnish cars for that purpose arises.[46] Of course, the filed tariffs generally provide for the furnishing of cars of various sizes. A distinct class of claims are those which are caused by the failure of the carrier to furnish cars by a specified time, or to keep on hand suitable facilities for taking care of the shipment while awaiting transportation. The latter class of cases peculiarly ap-

45. Wadley Sou. Ry. v. Kent & Downs (Ga. 1916), 89 S. E. 765.

46. Wadley Sou. Ry. Co. v. Kent & Downs (Ga. 1916), 89 S. E. 765.

Where a shipper is furnished cars for a shipment of live stock, without requiring him to sign any written contract, and a contract is presented to him for signature after the stock is in the car and about to start, and where he or the person signing it does not know its contents and has no time to read it, and signs to secure passes to attend the stock, such contract would not be a contract of the shipper, and the limitation restricting liability of the initial carrier to damages on its own line is not binding. Atchison, T. & S. F. Ry Co. v. White (Tex. 1916), 188 S. W. 714.

In an action for injuries to a shipment of mules, where the animals were kept in a car with an open trapdoor on the top some forty hours in winter without feed, water or rest, snow and sleet coming through on them, an instruction that the jury could not consider any damages or injuries occasioned by the condition the car was in (the bill of lading reading that the car had been accepted by the shipper as in proper condition) was erroneous, as calculated to lead the jury away from the main issue of the case, as it might have been possible for the road to make prompt shipment in the defective car without damage, and, even though the shipper was bound by the selection of the car and the provisions of the bill of lading, he had the right to expect prompt shipment. Covington v. Yazoo & M. V. Ry. Co. (Miss. 1916), 71 So. R. 821.

The provisions of a bill of lading covering a shipment of mules that the car or cars in which the animals were loaded had been examined and accepted by the shipper as being in proper condition, and that the road should not be liable except for loss resulting from its gross negligence,

ply to livestock. Carriers maintain pens at many shipping points, in which the livestock is confined while waiting for cars to arrive. Some times these pens are dirty and hence disease breeders, by reason whereof the livestock become infected. Sometimes the pens are in bad repair and the livestock break through

were void as an indirect effort of road to contract against liability for its own negligence, since a common carrier owes to the shipping public the duty to provide reasonably safe appliances and cars, and a common carrier may not, by special contract, limit or evade liability for its negligence. Covington v. Yazoo & M. V. Ry. Co. (Miss. 1916), 71 So. R. 821.

A shipper of live stock may for a cheaper rate bind himself to accept a less commodious car, if full opportunity is given him to choose from a list of cars of different construction. Covington v. Yazoo & M. V. Ry Co. (Miss. 1916), 71 So. R. 821.

Under Interstate Commerce Act, §I, as amended, providing that a shipper is entitled to accompany live stock if accepted for shipment, the fact that a carrier's conductor told the shipper's agent, who was accompanying a shipment of hogs, that he could not do so unless he signed the contract did not furnish consideration for the contract. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

The obligation to carry goods safely often requires that special kinds of cars be supplied for the transportation of goods which the carrier has accepted or holds itself out to carry. Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 Fed. 705.

Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry the oils of a refinery. Chicago, R. I. & P. Ry. C. v. Lawton Refining Co., 253 Fed. 705.

Where the tariffs of a railroad company, which owned no tank cars, did not purport that the tank cars would be furnished, held, the railroad company, having leased tank cars some of which it allowed a refinery to use, might withdraw the use of the cars from the refinery when they were needed to carry water to supply its engines and roundhouses, etc. Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 Fed. 705.

There are other limitations of the carrier's duty to accept goods, growing out of the usual course of business and the limitations of convenience. An express company that handles parcels is not bound to accept articles of great bulk, such as lumber and hay; nor are carriers bound to accept as baggage articles that, by reason of bulk or value, transcend the carrier's customary limitations. Pfister v. C. P. R. R., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Elliott on Railroads, Sec. 1466. Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 Fed. 705, 708.

A railroad accepting perishable goods requiring cars and equipment

and get lost. Sometimes the pens are too small and the livestock get crowded in them and injured. It is the duty of a carrier of livestock to keep its receiving pens in reasonably safe condition to hold cattle offered for shipment until they can be loaded, considering the ordinary conditions attending cattle in

of a peculiar kind guarantees, in the absence of some fact changing the nature of the undertaking, that it has such cars and equipment, and that it will properly use them in the transportation of such property. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

Under the Interstate Commerce Act and state laws, where there was a demand along railroad for cars for shipment of live poultry, it was railroad's duty to furnish cars suitable for such purpose. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

Where railroad accepts perishable goods with express or implied notice of the perishable character thereof, it is precluded, upon its failure to furnish cars, from asserting that it did not have the means or facilities for performing the duty it took upon itself; it being no defense that carrier did not own or control such cars or equipment. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

An irregularity of shipper's application for car for shipment of poultry was waived by carrier, where trainmaster received order, acted on it, and finally furnished the car on the application. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In an action against railroad for failure to furnish car for shipment within a reasonable time after shipper's application in violation of its duty under the Interstate Commerce Act, *held,* that the railroad's agent at one station had authority to receive application for car for shipment at another station. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In an action against railroad for failure to furnish car for shipment of live poultry within reasonable time after application therefor, as required by Interstate Commerce Act, where there was evidence of shipper's application for such car, the question of whether railroad furnished car within a reasonable time was for the jury. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In an action against a railroad for failure to furnish car within a reasonable time after application therefor, as required by the Interstate Commerce Act, evidence that plaintiff applied to another railroad for a similar car, which was furnished in less time than that in which defendant furnished car, was inadmissible, where it was not shown that conditions with reference to the two orders were the same. Ft. Worth & C. D. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In an action against a railroad for failure to furnish car, as required by the Interstate Commerce Act, the admission of evidence that shipper applied to another railroad for similar car, and was furnished car in less

such situation and their ordinary habits and propensities.[47] And a railroad can decline to accept a shipment of livestock by show-

time, was harmless, where there was other evidence of such facts admitted without objection. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In an action against a railroad for failure to furnish car within a reasonable time after application therefor, as required by the Interstate Commerce Act, evidence that defendant railroad furnished another shipper a similar car on a subsequent application before car was furnished plaintiff was inadmissible in evidence of unreasonable delay. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In a claim for damages against a carrier for failure to furnish a certain kind of car for a shipment of poultry, which it delayed in furnishing for eighteen days on the ground that it had to secure such car from the Live Poultry Transportation Company, which did not furnish such car before that time, the court held the carrier liable. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410, 412.

Where application was made for a car for shipment of live poultry, railroad's failure to furnish car within reasonable time, as required by the Interstate Commerce Act, was not excused by fact that it relied upon another company to furnish car, where such car was the one commonly used by the railroad for the shipment of poultry. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

Railroads are quasi public corporations, and acquire thereby an exclusive privilege to carry on their business over their highways, which powers are granted with the express view of their rendering adequate and impartial service to the public. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

In an action against railroad, based on railroad's violation of its duty to furnish transportation, under the Interstate Commerce Act, the burden is on railroad to allege and prove a legal excuse. Ft. Worth & D. C. Ry. Co. v. Strickland (ex. 1918), 208 S. W. 410.

A railroad's duty to "furnish transportation upon reasonable request," under the Interstate Commerce Act, requires it to furnish suitable cars as a part of the transportation. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

As railroad is required to furnish cars for goods accepted, and as facts excusing its failure to furnish cars when proper request is made and freight is offered are peculiarly within railroad's knowledge, the burden is upon railroad to establish facts constituting an excuse for failure to furnish cars. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

Generally, when cars are required by shipper, reasonable notice should be given by him, and a reasonable time allowed the company in which to procure cars. Ft. Worth & D. C. Ry. Co. v. Strickland (Tex. 1918), 208 S. W. 410.

47. Hardesty v. Atchison, T. & S. F. Ry. Co. (Mo. 1915), 179 S. W. 725.

ing that, at the time of tender of shipment, its stockyard, where, by federal statute, it was required to put off stock for resting, watering, and feeding in transit, was infected with a contagious disease, which condition the carrier did not have reasonable time to remedy.[48] Although a common carrier is bound to provide reasonable facilities of transportation to all shippers at every station, who in the regular and expected course of business, offered their goods for transportation, it is not required to prepare in advance for an unprecedented and unexpected rush on business, and therefore will be excused for delay in shipping or even in receiving goods for shipment until such emergency can in the usual and regular course of business be removed.[49] Very frequently shipping contracts contain a provision that the shipper has inspected the car and finds it suitable. An agreement requiring the shipper to inspect the cars, and accept them if in good condition, and declaring that, in the event of failure, it shall be conclusively presumed that the cars were suitable, is void.[50] Though a shipper examined and deemed a car sufficient for the transportation of horses, the railroad company is not relieved from liability for defects in the car.[51] This is so because it is the duty of a common carrier to furnish suitable and proper cars to be used in shipping stock.[52] It must be remembered, however, that the carrier has only to place cars at such places as either by custom or contract it obligates itself to do. Railroads are only required by law to furnish cars for the shipment of freight at stations or points on their road provided for the service of the public, or where the railroads are in the habit of accepting

48. Nashville, C. & St. L. Ry. v. Farrell & Braley (Ala. 1916), 70 So. 986, 987.

49. St. L. S. W. Ry. Co. v. Clay County Gin Co., 77 Ark. 362, 92 S. W. 531. St. Louis I. M. & S. R. Co. v. Laser Grain Co. (Ark. 1915), 179 S. W. 189, 191, 192.

50. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916), 182 S. W. 361.

51. Washington Horse Exchange v. Louisville & N. R. Co. (N. C. 1916), 87 S. E. 941.

52. Fuller v. Chicago & N. W. Ry. Co. (Nebr. 1916), 157 N. W. 332, 333; Chicago, St. P., M. & O. R. Co. v. Deaver, 45 Nebr. 307, 63 N. W. 790; Union P. R. Co. v. Langan, 52 Nebr. 105, 71 N. W. 979; Allen v. Chicago, B. & Q. R. Co., 82 Nebr. 726, 118 N. W. 655, 23 L. R. A. (N. S.), 278.

freight from any person offering same for transportation. So where a spur was a private track built for the sole and special use of a lumber company, and was under the exclusive control of that company, the railroad company could not, without violating its contract with the lumber company, which had assisted in the construction of the spur, place cars thereon for the use of shippers generally, unless by permission of said company.[53] With reference to live stock there can be no doubt that the law casts an obligation on a common carrier of live stock to exercise ordinary care to maintain its pens for the reception of stock in a reasonably safe condition so as to prevent the injury or escape of the animals placed therein by a patron for shipment.[54] Neither does a carrier, which maintains pens for the custody of live stock, prior to shipments, have to receive express notice that live stock has been put in pens, in order to charge it with negligence with keeping defective pens, and the railroad is responsible if through a broken fence in the pen, the live stock escapes.[55]

53. Beaumont, S. L. & W. Ry. Co. v. Moore (Texas 1915), 174 S. W. 844, 847.

54. Humphreys v. St. Louis & H. Ry. Co. (Missouri 1915), 178 S. W. 233, 234; Reading v. Chicago, B. & Q. R. Co., 165 Mo. App. 123, 145 S. W. 1166; Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505; Mason v. Mo. Pac. R. Co., 25 Mo. App. 473; Holland v. Chicago, R. I. & P. R. Co., 163 Mo. App. 251, 146 S. W. 1181; 1 Hutchinson on Carriers (3rd Ed., M. & D.), 114, 115.

Where the negligence of a railroad in failing or refusing to accept a shipment of live stock at a connecting point, concurred with the negligence of a connecting road in failing to deliver the shipment in question, on the transfer track, both companies were responsible for delays and the consequent damages proximately resulting from such negligence. St. L. S. W. Ry. v. Miller & White (Tex. 1916), 190 S. W. 819.

55. Humphreys v. St. Louis & H. Ry. Co. (Mo. 1915), 178 S. W. 233, 234.

But negligence in the furnishing of other facilities than cars may cause a shipper a loss. In a recent case it was held that a carrier was liable for failure to promptly load a shipment, although it appeared excessive rains had caused its switch track to slip. The court held that if it could be found that the railway, in the use of ordinary care, should have taken steps to provide against the effect of such rains, it was liable.

In Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Tex. 1918), 207 S. W. 570, the court said, p. 572:

" * * * the mere fact that the slipping of the track was caused by excessive and unusual rain would not necessarily excuse the railway com-

13. Place and Manner of Furnishing Cars. Very frequently, through agreement, or custom, the carrier may bind itself to furnish cars at certain points. This situation generally arises in the less densely populated portions of the country. Where shippers of livestock orally contract for cars for shipment, knowing that a written contract will be required and with the

pany, as it might reasonably have been found that the railway company, in the exercise of ordinary care, should have taken steps to provide against the effect of such rains. Ft. Worth & Denver City Railway Co. v. Atterberry, 190 S. W. 1133; G. C. & S. F. Ry. Co. v. Pomeroy, 67 Tex. 498, 3 S. W. 722. The defendant had pleaded that the rains were unprecedented, but the evidence was insufficient to support such allegation."

In an action against a carrier for damages to live stock from negligent delay in loading, it was proper to refuse to require a finding whether the delay was caused by the weakened condition of defendant's roadbed be found that, in the exercise of ordinary care, the carrier should have from excessive rains, since it might been provided against such rains, and particularly where the jury found the delay was not caused by an unavoidable accident brought about by heavy and excessive rains. Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Tex. 1918), 207 S. W. 570.

In an action for injuries resulting to live stock from delay in loading, where plaintiff relies both on the negligent condition of a switch preventing loading and the muddy condition of the loading pens as distinct acts of the loading, they require submission as distinct and separate special issues unless the pens' condition is proved merely to show effect of delay. Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Tex. 1918), 207 S. W. 570.

In an action for damages resulting only from delay in loading cattle, requiring them to remain in the carrier's muddy pens, there was no error in not submitting the negligent condition of the pens upon which no independent damage was sought, as special issue where the jury were instructed to determine if such condition caused the delay. Kansas City M. & O. Ry. Co. of Texas v. Bomar (Tex. 1918), 207 S. W. 570.

In an action for delay in shipment of live stock, plaintiff relies on negligent condition of switch track preventing loading, an instruction that the degree of diligence required in construction of main track is not same diligence required as to switch track, held, properly refused as argumentative in form. Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Tex. 1918), 207 S. W. 570.

In an action for delay in shipment of live stock, where plaintiff relies on negligent condition of switch track, preventing loading, an instruction that the degree of diligence required in construction of main track is not the diligence required in construction of switch track, held, properly refused, as on the weight of the evidence. Kansas City, M. & O. Ry. Co. of Texas v. Bomar (Tex. 1918), 207 S. W. 570.

purpose of executing such contract and thereafter do so, they are bound by its terms.[56] A written contract is not necessary to bind a carrier to furnish cars. The obligation may arise through on oral contract, or through the action of an agent in leading a shipper to believe that cars would be sent. And a railroad may bind itself by contract to furnish cars at a place not on its own line, but that of a connecting carrier.[57] And a traveling fast freight soliciting agent, soliciting trade at points not on the carrier's line, is a general agent with power to bind the carrier to

56. Atchison, T. & S Fe Ry. v Smyth (Tex. 1916), 189 S. W. 70.

In this case shippers of live stock at a point at which there was no regular station agent notified the nearest agent at a point 25 miles away that they would have 430 steers to ship two days later. The agent told them that he could not have cars for them until four days later and the shippers agreed to have the live stock ready at that time. The cars were not actually furnished until two days after the carriers had agreed to. Subsequently a written contract was executed which provided that all prior agreements concerning the furnishing of cars were merged in the written agreement and that the shipper expressly waived all claim for damages arising from the breach of any such prior agreement. It was held that the written contract determined the rights of the parties and barred damages for the breach of the previous oral agreement, an action having been brought for shrinkage of the cattle owing to the two days' delay.

Under the Interstate Commerce Act, providing that the term "transportation" shall include cars and all facilities of shipment, etc., and that it shall be the duty of every carrier to furnish such transportation upon reasonable request, and the amendment of Section 20, providing that a transportation company receiving property shall issue a receipt or bill of lading therefor, and other provisions of the act including Section 6, where a written contract made by plaintiff in consideration of reduced rates for the shipment of live stock expressly covenants that all prior understandings to furnish cars are merged and contained in the writing, and stipulating suit for damages shall be brought within six months, the conditions of liability for failure to furnish cars on the date provided by the previous oral understanding as stipulated in the bill of lading or contract are controlling, and the parties cannot recover on the alleged oral contract. Atchison, T. & S. Fe Ry. Co. v. Smyth (Tex. 1916), 189 S. W. 70.

Where cars were furnished on request for an interstate shipment of live stock, as required by the Interstate Commerce Act, the conditions in the contract as to the carriers' liability are controlling. Atchison, T. & S. Fe Ry. Co. v. White (Tex. 1916), 188 S. W. 714.

57. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. (Mo. 1916), 188 S. W. 1118.

furnish cars at such points.[58] So it may be stated that where a carrier, not being required by law to furnish cars at a point off its line and on those of a connecting carrier, does so furnish them, it ratifies its agent's contract so to furnish them, since it must have known that it furnished such cars under the contract.[59] It would follow, therefore, that in an action for damages for failure to furnish such cars it cannot deny the authority of its agent to make such an agreement. In an action against a carrier for damages for delay in providing cars pursuant to an alleged oral agreement between the shipper and the carrier's agent, where it was claimed that the agent would not make an agreement for a definite date until he got in touch with the dispatcher, and that upon receipt of such information he would advise the shipper if he would call, and the shipper never did call for such information, evidence that the dispatcher advised the agent immediately by wire that the cars could not be furnished on the date required by the shipper was admissible in evidence, as tending to show that the railroad was relieved of liability for failure to furnish such cars.[60] A carrier's promise to furnish cars and a shipper's agreement to route shipments by the

58. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. (Mo. 1916), 188 S. W. 1118.

59. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. (Mo. 1916), 188 S. W. 1118.

60. Atchison, T. & S. Fe Ry. v. Smyth (Tex. 1916), 189 S. W. 70.

In an action against an interstate carrier for damages for delay in providing cars pursuant to an alleged oral agreement between plaintiff and the carrier's agent, where it was claimed that the agent would not make an agreement for a definite date until he got in touch with the dispatcher, and that upon receipt of such information he would advise plaintiffs if they would call, and that the plaintiffs never did call for such information, evidence that the dispatcher advised the agent immediately by wire that the cars could not be furnished on the date desired by the shipper was admissible. Atchison, T. & S. Ft Ry. Co. v. Smyth (Tex. 1916), 189 S. W. 70.

Under a contract to supply cars for shipment of live stock, which the carrier broke by delay in supplying cars, knowing that the stock was intended for sale on the market in a distant city, the measure of damages is not the amount of depreciation at the point of shipment, but the depreciation in market value at the destination; that being within the reasonable contemplation of the parties. Levy v. Nevada-California-Oregon Ry. (Ore. 1916), 160 Pac. 808.

carrier's line are a sufficient mutual consideration to support the contract, even if the cars were to be furnished at a point 50 miles from the carrier's lines.[61] So where cars were frequently furnished to a shipper at his place of business at N., 50 miles from the carrier's line, and the carrier agreed to furnish him cars, the court cannot say, as a matter of law, that the carrier was bound only to furnish the cars at L., the nearest point on its line to N., or that there was no meeting of the minds.[62] And where the carrier agreed to furnish cars to the shipper, whose place of business was at N., 50 miles from the carrier's nearest line point, no guaranty of delivery at N. was necessary on which to base liability for failure to deliver.[63] Evidence that a shipper had frequently requested cars at a point not on the carrier's lines, and had obtained them through the traveling fast freight agent, is sufficient to warrant the finding that the carrier, by a course of dealing, had led the shipper to believe that furnishing cars at such point was not unusual, and that the contract so to furnish them was not beyond the scope of the agent's authority.[64]

14. **Embargoes.** An embargo by a carrier is its refusal to either furnish cars or to transport cars. The principal excuse is generally congestion of freight. For instance, owing to the great amount of export shipments, it is said that there was at one time over fifty thousand cars held on track in and around New York City, which could not be unloaded for lack of terminal facilities. The carriers thereupon placed an embargo upon freight coming to New York, refusing to accept cars from connecting lines destined to such point. Since, however, it is the duty of a carrier to furnish facilities sufficient to transact its business, it is very questionable whether it can be said that an embargo is legal unless occasioned through an unexpected calamity, such as flood, war or the like. While, of course, the equipment of the carriers was at a very low point, prior to the European war and

61. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. Co. (Mo. 1916), 188 S. W. 1118.

62. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. Co. (Mo. 1916), 188 S. W. 1118.

63. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. Co. (Mo. 1916), 188 S. W. 1118.

64. Kissell v. Pittsburgh, Ft. Wayne & C. Ry. Co. (Mo. 1916), 188 S. W. 1118.

the idle car shortage very large, nevertheless, it can be very seriously questioned whether the carriers should not have anticipated there would be a general speeding up of business after the war, due to heavy purchases in this country by the belligerent nations, and therefore be better prepared to meet the situation than they appeared to be subsequently.[65] It has been held that a so-

65. A common carrier will not be excused from its duty of furnishing shipping facilities to one offering commerce to it, upon the ground that all of its energies are required to meet government needs, brought about by the present state of war, where it does not appear that the granting of such facilities would divert any of the carrier's energies, or require of it service which would make it less able to perform its public duty. Norfolk & W. Ry. Co. v. Public Service Com. (W. Va. 1918), 96 S. E. 62.

A carrier knowing of a car shortage cannot evade its obligation to furnish cars for hogs where it so contracted, where it did not notify the shipper of such shortage, to the shipper's damage, by showing that it would have been a discrimination against other shippers. Texas Midland R. R. v. O'Kelley (Tex. 1918), 203 S. W. 152.

A railroad station agent has authority to contract to furnish freight cars at a certain time and place. Texas Midland R. R. v. O'Kelley (Tex. 1918), 203 S. W. 152.

While the Act of August 29, 1917, allowing the President in time of war to assume control of the railway systems, was passed pursuant to the war power of Congress, given by Const. art. 1, § 8, held, that a railroad embargo promulgated under presidential authority, though giving preference to war material, was nothing more than a regulation incident to the proper conduct of the business of railroads, and the control of the business of railroads, and the control which the President had assumed. United States v. Metropolitan Lumber Co., 254 Fed. 335.

In "Some Facts on the Car Shortage," by Ballard Dunn, published in *Traffic News* for April 1, 1917, the following interesting facts are set out:

"On October 1, 1916, the car shortage was 61,030. The greatest shortage was in box cars, namely, 33,016, while the coal car and gondola shortage was 19,872. The shortage in other equipment, tank cars, etc., was 8,142. On November 1 this shortage had grown to 114,908, but by December 1 the situation had slightly bettered. The shortage at that time was 105,527 cars.

"In contrast to this condition, however, on October 1, 1915, there was a car surplus of 78,299; on October 1, 1914, there was a car surplus of 131,027, while on June 1, 1914—sixty days prior to the beginning of the European was—there were 299,928 idle cars. * * *

"Notwithstanding the fact that during the last year and a half, the cost of freight cars has increased from 5 to 75 per cent, the railroads are placing large orders in an effort to supply the needed equipment. One hundred

called embargo, by which a railroad company at the request of a paper company, owning and operating a private sidetrack, refused to furnish cars to shippers for interstate consignment to such paper company, which the latter, under contracts with the shippers, was under an obligation to receive and did in fact receive, violates the provisions of the Hepburn Act, requiring railway companies to provide and furnish transportation to shippers upon reasonable request therefor, and such embargo could be removed by the railroad company without notice to the paper company, although such action produced a congestion of cars beyond the ability of the paper company to handle on its sidetrack in the usual way, and thus rendered the paper company liable to demurrage charges.[66] The Supreme Court of the United States in this case (Menasha Paper Co. v. C. & N. W. R. R. Co., 36 Supt. Ct., 501), seems to hold that a carrier has no right to embargo shipments that are in transit, saying, p. 503: "Two questions arise on the embargo: (1) Was it a violation of the Hepburn act? (2) If so, could the railway company recover on account of the congestion of cars resulting from its removal? That act requires railroad companies to provide and furnish transportation to shippers upon reasonable request therefor, and to exact this duty of the railway company was the right

nine thousand seven hundred ninety-two cars were ordered in 1915, and 150,376 new cars had been ordered for the year 1916, up to December 15. * * *

"It is interesting to note in connection with the present car shortage in America that, in 1915, there were 2,318,305 cars in the freight equipment of American railroads, with a total tonnage capacity of 91,982,452.

"This tonnage capacity of the American freight equipment is more than twice as great as the capacity of all the freight equipment of twenty-four of the leading nations of the world, outside of the United States.

"The total freight equipment of all these twenty-four leading countries, which is, practically speaking, the entire civilized world outside of the United States, is 3,443,532 cars of all descriptions, with an average total tonnage capacity of approximately 41,322,384.

"These figures strikingly illustrate the tremendous volume of business now being handled by American railroads. They also illustrate the superiority of American railroads over the railroads of all the world, and indicate in a most forcible manner the size of the transportation problem in America."

66. Menasha Paper Co. v. C. & N. W. Ry., 36.

of the shippers of the bolts to the paper company. Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426, 57 L. ed. 284, 46 L. R. A. (N. S.) 203, 33 Sup. Ct. Rep. 174. This is not denied by the paper company, nor did that company refuse to receive the cars. It is an inference from this that the paper company recognized it was under contract obligations to the shippers to receive the bolts; indeed, the whole case supposes it. It is alleged that 'between the 3d of June, 1908, and the 20th of July, 1908, both dates included, plaintiff [the railway company], as the last carrier, carried and delivered in interstate commerce certain freight in carload' lots (meaning the bolts). There is no denial that they were so carried. If the shippers had a right to send the bolts, necessarily the railway company was under a duty to transport them. The contention of the paper company, therefore, is tantamount to saying that the railway company performed its duty at the sacrifice of its rights. We are unable to concur in this view. The railway company violated its duty when it agreed to the embargo; it returned to its duty when it removed the embargo, and the rights which it exercised were those which it would have had if there had been no agreement between it and the paper company. The paper company had a direct remedy if it had been under no obligation to receive the bolts; it could have peremptorily notified the shippers not to send them, and such notice, under the circumstances, was an obvious course. It could not be protected from their receipt nor relieved from the obligation of their receipt by an agreement with the railway company against the duty which the law devolved upon the latter company. This duty it was deemed necessary to impose. It is positive and should be kept clear from agreements with others than the shippers which in effect stipulate for its violation. And this is the basis of our decision. If the paper company was under no obligation to receive the bolts from the shippers of them, it undoubtedly had the right to effectually notify the railway company not to receive them for shipment on its account except as it should direct. But, as we have seen, it received the cars, and this, we have said, was a recognition of the rights of the shippers. The cars did not arrive all at once, and a protest made at the first delivery of cars would have notified the railway com-

pany that the paper company was under no obligations to the shippers. And this certainly was the more imperative, as the railway company was the last carrier, and the shipments originated on other roads."

15. Transportation Over Designated Route. It is the duty of carriers to obey the routing instructions of shippers.[67]. Hence,

67. Section 15 of the Interstate Commerce Act provides as follows:

"* * * That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

The Interstate Commerce Commission has uniformly held that carriers absolutely must obey the routing of shippers.

Alabama Lumber & Export Co. v. L. & N. R. R. Co., 23 I. C. C. 84.

Humboldt Refining Co. v. M. K. & T. Ry. Co., 22 I. C. C. 363.

Goodkind Bros. v. C. I. & L. Ry. Co., 21 I. C. C. 17, 18.

Beekman Lumber Co. v. L. & N. Ry. Co., 21 I. C. C. 280, 281.

Switzer Lumber Co. v. T. & N. O. R. R. Co., 21 I. C. C. 290.

Ryland & Brooks Lumber Co. v. C. & O. Ry. Co., 21 I. C. C. 520.

Empire Wall Paper Co. v. Boston & Maine R. R., 20 I. C. C. 1.

Poor Grain Co. v. C. B. & Q. R. R. Co., 12 I. C. C. 418, 469.

Independent Supply Co. v. C. & P. R. R. Co., 20 I. C. C. 66.

Parfrey v. C. M. & St. P. Ry. Co., 20 I. C. C. 104, 105.

West Oregon Lumber Co. v. A. & C. R. R. Co., 20 I. C. C. 151, 152.

Noble v. J. L. C. & E. R. R. Co., 20 I. C. C. 520, 522.

Prentiss & Co. v. P. R. R. Co., 19 I. C. C. 68, 69.

Sikeston Merc. Co. v. L. & M. R. R., 19 I. C. C. 422.

Fish & Co. v. N. Y. C. & St. L. R. R. Co., 19 I. C. C. 425.

Poor Grain Co. v. C. B. & Q. Ry. Co., 12 I. C. C. 469.

Cressey & Co. v. C. M. & St. P. Ry. Co., 18 I. C. C. 132, 134.

Spreckels Bros. Commercial Co. v. Monongahela R. R. Co., 18 I. C. C. 190.

Delray Salt Co. v. M. C. R. R. Co., 18 I. C. C. 248.

Foster Lumber Co. v. A. T. & S. F. Ry. Co., 17 I. C. C. 292, 294.

Sunnyside Coal Mining Co. v. D. & R. G. R. R. Co., 17 I. C. C. 540.

Counsil v. St. L. & S. F. R. R. Co., 16 I. C. C. 188.

Cham. of Com. of Milwaukee v. C. R. I. & P. Ry. Co., 15 I. C. C. 460, 464.

Bregman & Co. v. Penn. Co., 15 I. C. C. 478, 479.

Duluth Log. Co. v. Minn. & Int. Ry. Co., 15 I. C. C. 627, 628.

Struthers-Wells Co. v. Penn. R. R. Co., 14 I. C. C. 291, 292.

Stedman v. C. & N. W. Ry. Co., 13 I. C. C. 167, 169, 170.

Larsen Canning Co. v. C. & N. W. Ry Co., 13 I. C. C. 286, 287.

Utterback Bros. Co. v. N. Y. C. & Co., Unrep. Op. 320.

a carrier is liable if it deviates from the route specified by a shipper. The Interstate Commerce Act gives the shipper the right to control the routing of a shipment. Where he exercises this right, it is the duty of the carrier to strictly obey such instructions. For a long while it was thought that if the carrier diverted from the route, its liability was simply to refund the difference in the freight charges, if any, between those applying via the route the shipment should have moved and the freight charges which lawfully accrued via the route it actually did move, its liability as an insurer, of course, continuing. It is now

Ludowici-Celadon Co. v. M. P. Ry. Co., Unrep. Op. 320.
Zuber v. C. of Ga. Ry. Co., Unrep. Op. 327.
Barker & Co. v. G. & S. I. R. R. Co., Unrep. Op. 332.
Paraffine Paint Co. v. S. P. Co., Unrep. Op. 369.
O'Halloran & Jacobs v. B. & A. R. R. Co., Unrep. Op. 494.
Wahlgren Furn. Co. v. C. M. & St. P. Ry. Co., Unrep. Op. 583.
Birge-Forbes Co. v. M. K. & T. Ry. Co., 28 I. C. C. 409, 411.
American Agricultural Chemical Co. v. Bangor & Aroostock R. R. Co., 28 I. C. C. 398, 400.
Egens & Howard Fire Brick Co. v. W. R. R. Co., 26 I. C. C. 152, 153.
Railroad Commissioners of Montana v. N. P. Ry. Co., 26 I. C. C. 462, 683.
Parlin & Orendorff Plow Co. of St. Louis v. U. S. Exp. Co., 26 I. C. C. 561.
J. R. Shoupe & Co. v. T. & B. V. R. R. Co., 26 I. C. C. 570.
In re Express Rates, 24 I. C. C. 380, 407.
Lathrop, Shea, Henwood Co. v. L. V. R. R. Co., 24 I. C. C. 622.
Paine Lumber Co. v. C. C. C. & St. L. Ry. Co., 24 I. C. C. 626, 627.
Barker & Co. v. G. & S. I. R. R. Co., Unrep. Op. A3.
Miller v. I. C. R. R. Co., Unrep. Op. A82.
Charles Becker v. P. M. R. R. Co., 28 I. C. C. 645, 654.
Ploughe v. C. B. & Q. R. R. Co., Unrep. Op. A101.
Bristol Door & Lbr. Co. v. S. Ry. Co., Unrep. Op. A206.
Vehicle Supply Co. v. L. Ry. & N. Co., Unrep. Op. A252.
Swift Beef Co., Ltd., v. C. P. Ry. Co., Unrep. Op. A284.
American Hay Co. v. B. & M. R. R., Unrep. Op. A286.
Hedden-Clark Lbr. Co. v. B. & O. R. R. Co., Unrep. Op. A301.
Hettler Lbr. Co. v. M. C. R. R. Co., Unrep. Op. A321.
Hinton Fruit & Prod. Co. v. C. & O. Ry. Co., Unrep. Op. A312.
United Kansas Portland Cement Co. v. M. P. Ry. Co., Unrep. Op. A321.
Fullerton-Powell Hard. Lbr. Co. v. M. & N. F. R. R. Co., Unrep. Op. A367.
Concentration of Cotton at Points in Arkansas, 29 I. C. C. 106, 108.
Noble v. D. T. & I. Ry. Co., Unrep. Op. A510.
Beaver Co. v. N. Y. C. & H. R. R. Co., Unrep. Op. A545.

becoming settled that the shipper may suffer an injury because of disobedience of routing instructions different and distinct from that which might be occasioned if the goods were damaged. It may be considered as fairly well settled that the carrier is liable for injury for failure to follow routing instructions even though the goods arrive at their destination in an unharmed and whole condition. Where prior to the amendment of June 18, 1910, a carrier entered into a contract with a shipper to transport certain freight to a point beyond the terminus of its own line, over a certain designated route, such contract was valid, and an action would lie for a breach thereof resulting in damages to the shipper.[68] If a carrier transports an animal by other than the stipulated route, and even though it is not an insurer, it takes the responsibility of exposing its vitality to the conditions of the route, so far as to require it to show that the departure did not contribute to its death; the Carmack Amendment not disturbing such common-law liability.[69] Claimant shipped a dog from Nassau County, New York, to California, which he delivered to the Adams Express Company to be delivered to the Wells Fargo Express Company at New York. The Adams Express Company did not do this, but sent it over its own line to Pittsburg, Pa., beyond which point at Wichita, Ohio, the dog was found in the car. The parties executed a live stock contract, and the express company issued the uniform express receipt according to its forms filed with the interstate Commerce Commission. The claimant contended that the express company, because it deviated from the route, was liable as an insurer. The court upheld this contention.[70] But special damages are not

So it has been held that the provision of Section 15 giving shippers the right to designate routing is inflexible and nothing in the nature of exceptions or exemptions has been promulgated by the Commission. (Concentration of Cotton at Points in Arkansas, 29 I. C. C. 106, 108. Also see "Digest—Supplemental and Quarterly Digests of Decisions under the Interstate Commerce Act," "Routing" and "Misrouting," Sections 6, 7.)

68. S. L. & S. F. Ry. Co. v. Bondies Co. (Okla. 1917), 166 Pac. 179.

69. Ely v. Barrett, 168 N. Y. S. 419.

70. The court said (Ely v. Barret, 168 N. Y. S. 419), p. 420: "The plaintiff's contention is that by reason of the deviation from the stipulated route the defendant is liable for the loss as insurer; while the defendant's theory is that the carrier at

common law does not insure against the consequences of the vitality of live freight, but is liable only for the results of its own negligence, that the parties have so stipulated in the form filed with the Interstate Commerce Commission, and that to allow a departure from such agreement would be a discrimination condemned by the Interstate Commerce Act. It is unnecessary to consider the Interstate Commerce Act farther than to note that under it the liability cannot be enlarged by the form of the action. Georgia, Fla. & Ala. Ry. v. Blish Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. In the contract the shipper releases the carrier—'from all liability for delay, injuries to or loss of said animals, * * * from any cause whatever, unless such delay, injury, or loss shall be caused by the express company or by the negligence of its agent and employes. * * * The shipper agrees that, as a condition precedent to recovery hereunder for loss or injury or damage to or delay in delivery of this shipment, such loss, injury, damage, or delay shall be proved by the shipper to have been caused by negligence of the carrier.' The stipulation means that in the course of the specific service undertaken, the carrier shall be liable for the loss caused by its negligence proven by the shipper. That put the burden of proof upon the shipper. But the carrier in fact departed materially from the agreement, and assumed to carry the dog by another route, for an increased distance under its immediate care and control in a different territory perchance under different climatic conditions, for delivery to a different connecting carrier, and in the course of such carriage the animal died. Do such facts relieve the shipper from further evidence that the death was caused by some act of defendant done or omitted, and impose upon the carrier the burden of showing, not only due care, but also that the changed route did not enhance the risk of loss? I am at the moment dealing merely with the effect of the deviation on the burden of proof of negligence. It was something more than negligence to divert the carriage from the Wells Fargo Express at New York. It was a willful act. The Wells Fargo Company was the appointed bailee; the defendant became from New York a bailee by its own wrong. It may be said that no casual connection between the deviated route and the death of the dog can be proven. But the essential of the inquiry is whether the shipper must follow his dog into such regions as the carrier may negligently or willfully have placed it, and trace what befell the animal in the vicissitudes of the errant transportation. That is a burden the shipper did not undertake, and in the nature of the case it could not have been contemplated. It is not the spirit of the Interstate Commerce Act, affected by the Hepburn and Carmack Amendments, that it is discrimination to require a carrier, who abandons an agreed service and assumes an authorized carriage, wherein the property was destroyed, to show that neither the abberation nor its conduct caused the loss. Reason and the necessity of the case require such conclusion. That judgment does not ignore the terms of the contract: (1) Because it is equivalent to holding that the facts fulfill the burden that imposes the proof on the shipper; (2) because the carrier, by breaking up the con-

certed route, put the shipper at a risk he did not assume, subjected him to conditions not contemplated, and placed him at a disadvantage that embarrasses or precludes proof of the carrier's acts and omissions. The stipulated facts show the following report by the express messenger: 'This dog was lying down in crate when received at Pittsburgh. Would not get up when loaded in the car, and appeared to be sick. I placed her near the door to get air, and gave her feed and water; but she would neither eat nor drink, and would not get up when I spoke to her. As she did not appear to be suffering, I thought she was all right. I looked in crate again after leaving Pittsburgh. She was still lying down. After leaving Wooster, Ohio, I examined her again and found she was dead.' What delay or exposure attended the diversion, where or under what conditions the sickness appeared, what was overlooked, if not beyond plaintiff's ascertainment, although presumptively within the knowledge of the erring carrier, were at least things that the shipper did not agree to prove. Moreover, when the dog was loaded in the car at Pittsburgh she was sick, and yet without rest she was sent forward. I think that the court was quite justified in finding that the defendant was negligent. In Cragin v. N. Y. C. R. R. Co., 51 N. Y. 61, 10 Am. Rep. 559, it was said that the carrier—'does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright, or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Therefore in this case it was not sufficient, to establish the common-law liability of the defendant, to show that the hogs died from heat; but it was incumbent on the plaintiff to show, further, that there was some negligence or omission of duty on the part of the defendant.' And it was decided that the carrier could by express contract exempt itself from liability for its own negligence. But, had the Cragin Case shown that the hogs were diverted by the carrier from the stipulated route and died in an unauthorized locality, taken sick under unknown conditions, with no explanation or proof of care, there is no reason to believe that more evidence would have been exacted. The decision in this state is that the carrier, in the absence of a limiting contract is liable as in the case of inanimate property for the transportation of live animals, except as to injuries arising from their nature and propensities, and which diligent care cannot prevent. Clarke v. Rochester & Syracuse Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205; Mynard v. Syracuse, etc., R. R. Co., 71 N. Y. 180, 27 Am. Rep. 28. In the present case the carrier limited its liability to proved negligence, which, as regards the vitality of the animal, is the law. But the usual rule is that, when a carrier deviates from the stipulated route, he becomes an insurer, and responsible for all loss and damage to the goods, even unavoidable casualty. In Maghee v. Camden & Amboy R. R. Co., 45 N. Y. 514, 6 Am. Rep. 124, it was said: 'If it could

recoverable in the absence of notice.[71] The state courts have jurisdiction of an action against a carrier for damages occasioned by the misrouting of an interstate shipment by which a privilege of milling in transit was lost, which would have been available if the shipping directions had been followed. Where a shipper

be shown, in such a case, that the loss must certainly have occurred from the same cause, if there had been no default, misconduct, or deviation, the carrier would be excused; but the burden of proof of this fact would be upon the carrier.' If a carrier takes upon itself the transportation of animals by whatever way it will and against an agreement with the owner, if it does not become an insurer, it is not too much to hold that thereby the carrier takes the responsibility of exposing their vitality to the conditions of the route, to the extent, at least, as to explain that nothing concerning the diversion contributed to an animal's death. The Carmack Amendment does not disturb such common-law liability. Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. I cannot but think that the acts bring this case within the decision in Galveston, H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481, 492, 32 Sup. Ct. 205, 56 L. Ed. 516."

71. In order to recover special damages, notice of such damages must be given to the carrier at the time of transportation. (See the Law of Loss and Damage Claims, pp. 243 et. seq., and cases cited thereunder.)

Special damages are not recoverable in case of diversion from the specified route, but such damages as naturally accrue as a result of such diversion may be recovered. A deviation is a voluntary departure without reasonable cause from the regular and usual course of transportation. Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1.

Whether there has been a deviation or not, is on conceded facts, a question of law for the court. Crosby v. Fitch, 12 Conn. 410.

. If a carrier deviates, without necessity, from the usual and common course of trade or the regular and usual route, and the goods are lost or injured during such deviation or as a consequence thereof, he is responsible therefor, and is not excused even if the loss or injury result from the act of God, inevitable accident, or act of the public enemies. Such excuse is only available to him while in the pursuit of his voyage in the usual way. Michie on Carriers, p. 511, and cases cited thereunder. If, however, the shipper gives the carrier permission to deviate, it would relieve it from liability for such deviation. Of course, even in the case of special damages, the carrier's liability as an insurer is still absolute. The only difference between the damages which accrue as the result of deviation and where there is no deviation is that simply in the one case the carrier is absolutely liable no matter how the loss occurs. That is, if through flood, or an act of God, the shipment is damaged, the carrier is still liable.

of grain is required to submit to a reduction in the selling price because a milling in transit privilege was lost through misrouting, he is entitled to recover the amount of his loss from the carrier in fault.[72] The railroad, however, is not the only party that is always liable for damages for misrouting. Thus, where a transfer company agreed to ship the goods of the claimant over a certain route and took from him a shipping order limiting the liability of the transfer company, and thereafter shipped the goods over a different route from that specified by the shipper,

72. McCullough v. Mo. Pac. Ry. (Kans. 1916), 160 Pac. 214.

In this case a shipper routed wheat from Kansas to Indiana by way of Chicago. Had the shipment been transported through Chicago, a milling-in-transit privilege would have applied, which would have been worth 5½c a hundred pounds to the buyer. The carrier transported the shipment by way of Logansport, Ind., by virtue of which the transit privilege was lost. It was held that the shipper was entitled to recover the 5½c a hundred pounds from the carrier at fault.

Also see Rock Milling El. Co. v. Ry. Co. (Kans. 1916), 158 Pac. 859.

Where a carrier delivered stock at the wrong point, and the shipper had to hire a car to ship them to the agreed destination, the carrier is liable for the cost of shipping them there, in an action for breach of contract, enforceable in a state court, the question not being one in relation to an extra charge for misrouting under the provision of the Interstate Commerce Act. Wooster v. Chicago & N. W. Ry. Co. (Wis. 1918), 166 N. W. 431.

Claimant shipped stallions from Rhinelander, Wis., which were routed to be delivered to a specific person at Allentown fair-grounds, Allentown, Pa. The delivering line left them at the Allentown station, seven miles from Allentown fair-grounds. The shipper was thereby compelled to engage another railroad to transport these cars to the fair-grounds. The court said:

"This recovery is not a claim for an extra charge for misrouting under the provision of the Interstate Commerce Acts, but is one for damages caused by defendant's breach of its contract for failure to deliver the shipment at the place of destination specified in the contract. Under these facts and circumstances the defendant is liable for breach of contract which is enforceable in the state courts. Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167; Galveston, H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516." Wooster v. Chicago & N. W. Ry. Co. (Wis. 1918), 166 N. W. 431, 432.

In an action against a carrier for refusing to forward goods via a connecting line, an erroneous statement of route in the billing does not excuse defendant, who knew such statement was erroneous and refused to forward for other reasons. Quanah, A. & P. Ry. Co. v. Bone (Tex. 1917), 199 S. W. 332.

in consequence of which they were burned, it was held that the transfer company was liable for the value of the goods, less the amount recovered from the railroad company, and without regard to the limitation of liability in the shipping order.[73]

73. O. K. Transfer, etc., Co. v. Neill (Okla. 1916), 159 Pac. 272.

III.

NEGLIGENCE DURING TRANSPORTATION

1. Circumstances Relieving from Liability.
 —In General.
 —Inherent Nature of Shipment.
 —Act of God.
 —Act of Public Enemy.
 —Operation of Law.
 —Fault of Shipper.
2. Defective Appliances.
 —Livestock.
3. Confiscation of Fuel.
4. Delay.
 —Evidence of Unreasonable Delay.
5. Embargoes.
6. Congestion of Freight.
7. Loss by Fire.
8. Damage by Flood.
9. Freezing.
10. Refrigeration by Carrier.
11. Rough Handling.
12. Shipments in Open Cars.
13. Shipments Stopped in Transit.

1. **Circumstances Relieving From Liability. In General.** By far the greater number of claims arise because of the negligence of the carrier during transportation. Since it is held to an extraordinary degree of care in practically all instances, it is obvious that what might legally be termed negligence might not appear as such to the lay mind. The carrier performs transportation for hire. Being paid for this service, the law early read into the contract of transportation the extraordinary liability of insurer. It was assumed the rate charged was high enough to fully compensate the carrier for such

damages as it might be compelled to pay because of oversight or carelessness on the part of any one of its numerous employes. It was deemed to the public interest to hold the carrier to such strict accountability. If not, and the carrier could plead exemption because the carelessness of an employe was unintentional, then there would be no inducement to a carrier to be careful in its operation or circumspect in its hiring of employes. Recognizing, however, that no matter how careful the carrier might be, there were certain causes of loss over which it had no control, the law exempted the carrier from loss caused through any one of five reasons. These are an act of God, such as an earthquake, avalanche and the like; an act of the public enemy, which means hostile troops, but not strikers; the fault of the shipper, such as defective loading of the goods, where the shipper loads; and the natural propensities of live-stock, in case of such shipments, which exempts from injuries caused through goring, fighting and the like; the last exemption might be termed exemption through special laws, and refers only to exemptions in the navigation laws, under which, in certain cases, a vessel can throw its cargo overboard without incurring any liability therefor. These are general rules, however, and exceedingly dangerous when applied by inexperienced or biased parties. Like all general rules, they have been very greatly modified by the decisions of the various courts. An exhaustive discussion is out of place here, but some slight explanation will be attempted. In analyzing cases in which the carrier claims an exemption it is desirable that the theory concerning the liability of the carrier be always kept in mind. Many courts have gone astray on this question. It is surprising how many courts, in holding the carrier liable for loss, assume that it is merely a case of negligence, that is, that the carrier is liable for loss because it is negligent. Around that fallacious theory has grown up those cases which are so vexatious to the traffic counsel, and mislead so many claim agents. A claim is presented against a carrier; the claim agent investigates and finds that the railroad acted with due diligence in transporting and can find no record of rough handling. Nevertheless, damage has occurred. He refers the case to the railroad's commerce counsel. The law is examined and those cases are found which appear to place the

liability of the carrier on the ground of negligence. No negligence appearing in this case, the claim is declined. Now the carrier may innocently have done an injustice to the shipper and turned down a claim which was perfectly valid. The carrier is held liable for loss because it is paid a consideration to safely transport the shipment from origin to destination. The failure of the carrier to safely transport the goods is therefore the breach of a contract. Since, under our system of jurisprudence, claim for such loss or damage may be brought either as damages for breach of the contract or in what is called a tort action, that is, an action for a wrong done to the owner of the goods, it is presumed that since the goods were not safely carried the carrier committed the wrong by being negligent. It is seen therefore that the liability of the carrier arises not because the goods were damaged, but because the goods were not safely transported, which is conclusively shown by the goods being damaged or lost. This wrong is not excused by the carrier showing it used care in the transportation, because it was early declared in the law that public policy demanded that the carrier be held to a strict performance of its contract for safe transportation. It is on this account that it was very early held that the carrier could not by contract exempt itself from liability for loss or damage caused by its negligence. Recognizing, however, the right of persons dealing on an equality to enter into such contract as they desired, it has come to be the rule that for a consideration the shipper and the carrier can agree that the liability for loss or damage, no matter how caused, may be limited to a certain amount. This phase of the law will be discussed more in detail under the Cummins amendment, Chapter 8. It was also early recognized that there were certain causes which occasioned loss and over which the carrier had no control. It was considered unfair to hold it to liability in these cases and it is a brief discussion of these five excepted causes which we now come to.[1] But speaking generally, the carrier is liable as an insurer until the goods are delivered to the consignee or placed in a warehouse in the event of his failure or refusal to accept.[1½]

1. See Chapter VI, *infra*.

1½. In Chicago & E. I. R. Co. v. Collins Produce Co., 39 Sup. Ct. 189, the court said:

—**Inherent Nature of Shipment as Relieving From Liability.** This doctrine generally applies to shipments of perishable produce and livestock, although it may be invoked in any case where the inherent character of the goods shipped is such as to naturally cause a deterioration during transit. For instance, if perishable produce is shipped in poor condition, so that in spite of all necessary precautions and the usual scheduled transportation, the carrier is not liable. Very often grapes, for instance, have been damaged by a rainy season. They are packed carefully, shipped under proper refrigeration, but decay is due to natural causes and not to any breach of contract of the carrier. Under these conditions the carrier cannot be held responsible. On the other hand, it must be borne in mind that if negligence of the carrier is also shown, the carrier is, by the weight of authority, held responsible. So damages

"The duties and liabilities of a common carrier have been so fully discussed by this court, notably in Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, and in Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 23 L. Ed. 872, that they need not be restated here.

"The common-law principle making the common carrier an insurer is justified by the purpose to prevent negligence or collusion between dishonest carriers or their servants and thieves or others, to the prejudice of the shipper, who is, of necessity, so remote from his property when in transit that proof of such collusion or negligence when existing would be difficult if not impossible. Coggs v. Bernard, 2 Lord Raymon, 909; Riley v. Horne, 5 Bing. 217. The obligation to transport and to deliver is so exceptional and absolute in character that the relation of the carrier to the shipper was characterized in Railroad Co. v. Lockwood, supra, as so partaking of a fiduciary character as to require the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him, and so lately as American Express Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536, this court declared that if a carrier, by connivance or fraud, permitted a judgment to be rendered against it for property in its charge, such judgment could not be invoked as a bar to a suit by a shipper.

"These decisions, a few from many, illustrate the character of the relation of trust and confidence which must be sustained between a common carrier and a shipper. It rests at bottom upon a commercial necessity and public policy which would be largely defeated if the carrier were permitted by false representations or by representations, which, though not intentionally false, were not known to be true, to procure the appropriation by military or other authority of property in its custody, as the jury found was done in this case, and thereby defeat its obligation to carry and deliver."

sustained through livestock being unruly, vicious, and ill tempered, are not such damages as the carrier is responsible for. On the other hand, if the carrier confines the stock in pens too small, or transports it under such conditions that its negligence contributes to the injury, then as in the case of shipments of perishable produce, it may be held responsible.

—Act of God. An Act of God is such an inevitable, or unavoidable, accident not attributable to human agency as produces injury to the goods. It must be one of those misfortunes which no skill or watchfulness on the part of the carrier could have foreseen. Many examples will at once suggest themselves to the reader. Floods, cyclones, earthquakes, and the like, are generally regarded as furnishing an excepted cause. But even these will not excuse the carrier if they could have been foreseen by the carrier or if it had knowledge in time to protect the shipments. This will be discussed somewhat more in detail under other sections.

—Loss Through Act of the Public Enemy. While a loss suffered because of such an agency excuses the carrier, an excuse of this kind very rarely arises. What is meant by public enemy is an enemy of the country to which the carrier belongs. Thieves, robbers, rioters, strikers, and unruly soldiers are not deemed public enemies, and damages caused through the act of any such persons is not under this class.

—Operation of Law. This exception to liability is only a very rare one. It can only arise in cases where a loss occurs on a connecting water carrier. Under the Harter act, vessels are discharged from liability in certain cases where necessary to throw a cargo overboard. Since under the Carmack amendment the initial carrier is liable for any loss occasioned through the default of a connecting carrier, it has recently been held that where under the Harter act the water carrier is exempted from liability this inures to the benefit of the initial rail carrier.

—Fault of Shipper as Relieving From Liability. It is the practice for shippers of carloads to load the freight. The carrier therefore has no supervision over packing and bracing of the shipment. Frequently the cars are delivered to the railroad al-

ready sealed. If the carrier has furnished a suitable car for the shipment it is the duty of the shipper to properly pack his shipment in loading the car. Any damage, therefore, which is occasioned through the defective loading or packing of the car is the fault of the shipper and the carrier is not liable for such damage. But, on the other hand, the carrier is liable in spite of defective loading if it furnishes an improper car or handles the shipment roughly in transit or is guilty of any other act which contributes to the injury.

2. **Defective Appliances.** Very frequently damages during transportation arise from the fact that the car in which the goods are shipped is defective. Sometimes protruding nuts, bolts, nails, and similar things cause damage. A leaky roof permitting rain to come in is another common defect. Claims for such damages are generally declined because of the fact that the shipper has examined and accepted the car. A common carrier is bound to furnish shippers suitable, safe and secure cars in which to carry such property as it holds itself out as transporting, and is liable for any damage resulting from its failure to do so. Injury to property because of bolts, nails, leaky roofs and the like, are occasioned not from any failure of the shipper to properly pack his shipment, but because of the defective instrumentality of transportation furnished. The carrier's duty to furnish properly equipped cars is not fulfilled by the mere purchase of a quantity of box cars to be used promiscuously for all kinds of freight. It must furnish such instrumentalities as will safely carry the commodities that it accepts for transportation; thus if it holds itself out as a carrier of perishable produce, it must furnish refrigerator cars when these are necessary. If it is a carrier of livestock, it must furnish the regular livestock cars and equipment. It could not fulfill its duty by tendering a car for the transportation of food produce in which livestock had been carried. If it agrees to transport oriental rugs its duty is not fulfilled by loading them into open cars. Supposing it had cars in service on which false bottoms had been nailed for the carriage of a certain commodity. The false bottoms and sides had been torn out and the nails and bolts left protruding, could it be argued that the carrier had fulfilled its duty in furnishing such

equipment for shipments of paper? Obviously not, because it would not be a safe and secure car for the transportation of that commodity. A shipper is not bound to take a searchlight and examine every nook and cranny of the car to see that it is suitable. If it notifies the carrier to furnish a car when such car is tendered, it has the right to assume that it is proper for the purpose for which it is to be used. While the state courts seem somewhat divided upon the question as to the effect of a provision in the bill of lading that the shipper has examined a car and finds it to be safe and suitable, the better rule seems to be that such a provision is invalid as operating to cast upon the shipper the duty of inspecting and determining the safety and efficiency of the means the carrier has provided for the discharge of its public duty. Its necessary effect would be to release the carrier from liability for negligence for failure to provide safe and suitable vehicles. This reasoning seems to be upheld by the great weight of authority and is certainly in line with the provisions in the Cummins amendment. The Supreme Court of the United States has been inclined to the view that the fact that the shipper uses a defective car, knowing it to be defective, does not relieve the railroad from liability in the absence of a distinct agreement to that effect.[2]

2. Railroad Company v. Pratt (22 Wall), 89 U. S., 123.

A common carrier is bound to furnish shippers suitable, safe, and secure cars in which to carry such property as it holds itself at as transporting and is liable for any damage resulting from its failure to do so.

In St. L. I. M. & S. Ry. Co. v. Marshall, 74 Ark, 597, a defective car was furnished for the shipment of potatoes, which were damaged through rain leaking through the car. The shipper knew the condition of the car and accepted it for shipment. In permitting recovery for the damage to the potatoes caused by rain, the court said, p. 599:

"The carrier must furnish suitable and proper cars for the purpose of the shipment. 4 Elliott on Railroads, sec. 1475. If the carrier fails to furnish proper cars, and damage results from the defect in the car, then the carrier who furnished the defective car is liable, although the actual injury may have occurred beyond its line. Indianapolis, etc., Ry. v. Strain, 81 Ill. 504; Ala. & Vicksburg Ry. v. Searles, 71 Miss. 744; Searles v. Ala. & Vicksburg Ry. 69 Miss. 186; 4 Elliott, Railroads, sec. 1448 and notes."

To the same effect see the following cases:

—**Livestock.** It is the duty of a common carrier of livestock to provide proper facilities for the loading, transportation and delivery of the livestock which it undertakes to carry, and during the transportation of the stock to take such precautions as rea-

Froelich v. Pennsylvania Co., 138 Mich. 116.
Railroad v. Dies, 91 Tenn. 177.
C. & A. R. R. Co. v. Davis, 159 Ill. 53.
I. B. & W. Ry. v. Strain, 81 Ill. 504.
Railway Co. v. Searles, 71 Miss. 744.
Searles v. A. W. Ry. Co., 69 Miss. 186.
St. L. I. M. & S. Ry. v. Lesser, 46 Ark. 236.
Welsh v. P. F. W. & C. R. R., 10 Ohio State 65.
Railroad Company v. Pratt, 89 U. S. 123 (22 Wall.).
Elliott on R. R., 2nd edition, sec. 1475, 1478.
Hoosier Stone Co. v. Louisville, etc., 131 Ind. 575.
Coupland v. Housatonic R. R. Co., 61 Conn. 531.
New Jersey, etc., Co. v. Merchants' Bank, 6 How. (U. S.) 344.
Levering v. Union, etc., Co., 63 Pa. St. 14.
Paramore v. Western R. R. Co., 53 Ga. 383.
Insurance Co. v. St. L. R. R. Co., 3 McCrary (U. S.) 233.
Bissell v. New York C. R. R. Co., 25 N. Y. 442.
Ford v. London, etc., R. Co., 2 Fost. & Fin. N. P. 730.
Merchants' D. Co. v. Cornforth, Colo. 280.
Boscowitz v. Adams Exp. Co., 93 Ill. 523.
Lyon v. Mells, 5 East 428.
Combe v. London, etc., R. Co., 31 L. T. R. (N. S.) 613.
Ayres v. Chicago & N. W. R. Co., 71 Wis. 372.
Wallingford v. Columbia, etc., R. Co., 26 S. Car. 258.
Hamilton v. Western, etc., R. Co., 96 N. C. 398.
Leonard v. Fitchburg R. Co., 143 Mass. 307.
Hart v. Allen, Watts (Pa.) 114.
New Jersey, etc., R. Co. v. Kennard, 21 Pa. St. 203.
Smith v. New Haven, etc., R. Co., 12 Allen (Mass.) 531.
Pratt v. Odgensburg, etc., R. Co., 102 Mass. 557.
Chicago & A. R. R. Co. v. Suffern, 129 Ill. 274.
Costello v. Syracuse, etc., R. Co., 65 Barb. (N. Y.) 92.
Illinois Central R. R. Co. v. Baches, 55 Ill. 379.
Rice v. Western, etc., R. Co., 3 Inters. Rep. Com. 162.
Scofield v. Lake Shore, etc., R. Co., 2 Inters. Com. 67.
St. Louis, I. M. & S. Ry. Co. v. Marshall, 74 Ark. 597.
Harris v. Railroad Company, 20 N. Y. 232.
Railway Company v. Dorman, 72 Ill. 504.
Potts v. Railway, 17 Mo. Appl. 394.
Propeller & Niagara v. Cordes, 21 How. 23.
The Northern Belle, 9 Wall. 526.
The C. & A. Ry. Co. v. Burke, 13 Wend. 611.

sonable prudence suggests to insure safe delivery.[3] A carrier is required to furnish reasonable facilities and opportunities for feeding and watering stock shipped under a contract, requiring the shipper to care for them.[4] Dipping cattle by a railway company in compliance with quarantine regulations established by

Lyon v. Mells, 5 East 428.

Smith v. New Haven Ry. Co., 12 Allen 531.

Mason v. M. P. Railroad, 25 Mo. App. 473.

Slown v. Railroad, 58 Mo. 220.

It seems clear that by the weight of authority the carrier is responsible for such damages, irrespective of whether the shipper accepted and loaded the car or not.

The rule is even stricter as applied to perishable goods. Thus Michie on Carriers, p. 784, states the rule as follows:

"A carrier undertaking to transport perishable goods is bound to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract. If it undertakes to carry perishable property in vehicles specially adapted to preserve that kind of property, it becomes responsible for defects in such vehicles, if damage results. The carrier is not relieved of responsibility to the consignee therefor by the fact that it had the car inspected by the shipper from whom the goods were brought."

Also see:

St. Louis, etc., R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S. 317.

Missouri, etc., R. Co. v. McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

Western Railway v. Hart, 160 Ala., 599, 49 So. 371.

3. Walton Land & Timber Co. v. L. & N. Ry. (Fla. 1916), 72 So. 485.

In the absence of a contract limiting the liability of a common carrier of livestock, its liability is that of an insurer against such loss or damage as does not arise from the act of God, the public enemy, and those arising from the nature and propensities of the animals received for transportation against which due care could not provide. Walton Land & Timber Co. v. L. & N. R. Co. (Fla. 1916), 72 So. R. 485.

4. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

In an action against a carrier for injury to a mule in transportation, where the animal caught its foot in a crack four or five feet above the floor of the car, evidence held sufficient to warrant the deduction of an improper construction of the car. Ft. Worth & R. G. Ry. Co. v. Albin (Tex. 1916), 185 S. W. 647.

It being a matter of common knowledge that the natural propensity of a mule is to kick, it is the duty of a carrier transporting such animals to take into consideration and furnish cars constructed with due regard for this propensity. Ft. Worth & R. G. Ry. Co. v. Albin (Tex. 1916), 185 S. W. 647.

law is a part of the service required by the shipping contract, and the question of negligence in the performance of this service must be measured by the terms of that contract.[5] Under separate contracts for the shipment of livestock requiring the shipper to care for, feed and water the stock in the yards, and to unload and reload for any purpose at his own expense, and to hold the carrier harmless on account of damages to the stock while in charge of the shipper, based upon the shipper's free transportation, the duty devolved upon the shipper as an ordinarily prudent person to feed and water the stock, and if that was not done under the necessities of the trip, considering the length of time in transportation and the condition of the stock, the carrier was not liable for the resulting damages from shrinkage.[6] In an action for injuries to cattle which were unloaded for rest and food in a hot, dusty pen, unprotected from the sun, where until that time they were in good condition, the court cannot as a matter of law hold that the injuries to the cattle resulted, not from the place of unloading, but because they were transported from a cool climate to a hot, dry one.[7] So unloading and feeding pens which are mere open corrals in the sand

5. M. K. & T. Ry. Co. v. Skinner (Okla. 1916), 160 Pac. 875.

In an action for damages against a railway company for negligence in failing to water cattle before dipping them, in compliance with established quarantine regulations—although the plaintiff contends that the contract for dipping was an independent, oral contract—the exclusion of the shipping contract, when offered in evidence in support of the allegation of the answer setting up such contract as a defense to the action, is prejudicial error. M. K. & T. Ry. Co. v. Skinner (Oklao 1916), 160 Pac. 875.

6. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

7. Southern Pac. Co. v. Stewart, 233 Fed. 956.

In an action for negligently unloading cattle for rest in pens which were dusty and unprotected from the sun, evidence that the pens were similar to pens on other portions of the carrier's line is inadmissible, for it is no defense to the negligence charged that the carrier was guilty of similar acts of negligence. Southern Pac. Co. v. Stewart, 233 Fed. 956.

Where the claim for injuries to cattle was that they were unloaded in hot, dusty pens, unprotected from the sun, an instruction on the shipper's failure to discharge his duty to load and reload the cattle at resting places en route is inapplicable to the evidence, and properly refused. Southern Pac. Co. v. Stewart, 233 Fed. 956.

without any shade of any kind are not "properly equipped pens for rest, water and feeding," as is necessary under the twenty-eight hour law.[8] Where a shipper claimed that his cattle were injured because the carrier negligently unloaded them to water, feed and rest in pens unprotected from the hot sun, an instruction to find for the carrier if it was more humane to unload the animals as done than to have continued the journey is improper, as ignoring the right of the shipper to control the shipment and require direct transportation upon executing a release for injuries for confinement beyond the twenty-eight-hour period.[9] A shipper of cattle has the right to require them to be kept in transit longer than twenty-eight hours. If between that period they arrive at unloading pens which he considers unsuitable for them, and if he requests them to be carried to other unloading pens, and is willing to execute a release in writing against liability if they are so transported, it is the duty of the carrier to comply with such request. [10] Under the twenty-eight-hour law, declaring that no carrier shall confine cattle or other animals in cars for more than twenty-eight hours without unloading for rest, water and feeding, but that the shipper may consent to the time of confinement being extended to thirty-six hours, the pen-

8. Southern Pac. Co. v. Stewart, 223 Fed. 956, 958.

The Twenty-eight Hour Act, requiring the unloading of cattle for resting and feeding withing that time unless the shipper consents that they be carried for a continuous period of 36 hours, requires the cattle to be unloaded in properly equipped pens for resting, watering and feeding, and a carrier cannot justify its act in unloading in hot and dusty pens by reason of the law. Southern Pac. Co. v. Stewart, 233 Fed. 956.

9. Southern Pac. Co. v. Stewart, 233 Fed. 956.

10. Southern Pac. Co. v. Stewart, 223 Fed. 956, 959.

Where the defendant railway company received hogs to transfer from one carrier to another, which had been confined for nearly 34 hours, the shipper having agreed that they might be confined for 36 hours, and defendant's agents, owing to the indistinctness of notations on the bill of lading, failed to discover that the hogs had been confined for nearly the maximum period, and kept them confined for more than the 36 hours, defendant was liable for a violation of the Twenty-eight Hour Law, it appearing that two hours would have been a reasonable time for it to have transferred the hogs and unloaded them; the indistinct notation on the bill of lading not affecting defendant's lialility. U. S. v. Sioux City Term. Ry. Co., 234 Fed. 663.

alty provided for violation may be recovered, though confinement beyond the thirty-six-hour period, which was consented to by the shipper, was not willful or with intent to do injury to the stock.[11] In an action to recover the penalty imposed by the twenty-eight-hour law, where a carrier keeps cattle confined longer than the maximum period of thirty-six hours, unless necessitated by storm or accident, it is no defense that an accident occurred on the last part of the journey, where, despite such accident, the shipment might have arrived in less than thirty-six hours, had diligence been exercised.[12] In an action against a carrier to recover the penalty provided in the twenty-eight-hour law for knowingly and willfully confining stock beyond thirty-six hours, it is not necessary to recover the penalty that there was a direct intent to injure the stock, the question of willfulness being determined from the entire circumstances.[13]

3. **Confiscation of Fuel in Transit.** A very aggravating class of cases are those in which in times of great shortage or other occasions the carrier will confiscate cars of coal or oil consigned to shippers and convert the same to its own use. In some instances this may mean the shutting down of a factory and consequent loss of tens of thousands of dollars of profits which might have accrued had the factory been running. A railroad has no right to confiscate coal. This is exactly the same as stealing it. Coal consigned to a person is his property, the same as any other shipment. The parties who confiscate the coal are guilty of larceny and can be punished criminally. It is a question whether the civil liability of the carrier for confiscating coal is the market price of the coal or the loss to the business. Of course, what a factory wants is the coal to keep the business running. While the railroad is a public utility, this does not give it unlimited power. It has the power of eminent domain,

11. C. & N. W. Ry. Co. v. U. S., 234 Fed. 268.

12. C. & N. W. Ry. Co. v. U. S., 234 Fed. 268.

In an action to recover the penalty imposed by the Twenty-eight Hour Law for keeping cattle confined longer than 36 hours, evidence that the confinement was occasioned by the carrier's negligence held sufficient to go to the jury. C. & N. W. Ry. Co. v. U. S., 234 Fed. 268.

13. C. & N. W. Ry. Co., v. U. S., 234 Fed. 272.

but this is simply the right by statute to condemn land for railroad purposes upon payment of just compensation. This power does not extend to anything else.

4. **Delay in Transit.** Of all classes of claims perhaps the most numerous are those for damages due to delay. Particularly is this true of livestock and perishable produce claims. This class of claims is very vexatious because so many elements enter into it which must be considered. Then again, there are many shippers who resort to devices which cause the railroad a great deal of trouble. It is well known that the "shrink" of cattle, for instance, is a very dubious and unknown quantity, particularly if the shipper has filled the cattle to bursting with water just before shipment. On the other hand, crowding too many cattle into a car is not doing them any good, hence a delay, which under ordinary circumstances, might not amount to anything, in such a case can cause very severe loss to the livestock shipper. Hence the rule has grown up that carriers of livestock and perishable produce are held to a stricter schedule of transportation than in the case of other freight. The fact that shippers rely on reaching a certain market by a definite time is also of considerable weight. The Supreme Court of the United States recently upheld a verdict for damages due to missing the market for strawberries by a few hours.[16] In Chicago & N. W. Ry. Co. v. United States, 38 Sup. Ct. 351, the Supreme Court of the United States said, (p. 352): "In the exercise of ordinary care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to

16. N. Y. P. & H. R. R. Co. v. Peninsular Prod. Ex., 240 U. S. 34, 60 L. Ed.—, 36 Sup. Ct. 230.

Damages for the loss of the market because of unreasonable delay in transportation occurring anywhere en route are comprehended by the provision of the Carmack amendment. New York, P. & N. R. Co. v. Peninsula Produce Exch., *Supra*.

Patterson v. Chicago & A. Ry. Co. (Mo. 1916), 182 S. W. 1034.

prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused." Where a shipment of dressed poultry could have been brought to its destination in time for the market of a given day by diverting it to another train at an intermediate point, and as a result of failure to so divert the shipment the poultry was spoiled, and was not in fit condition when the market was opened on the following day, the carrier was liable.[17] In the case of per-

17. Whittom v. Adams Express Co. (Mo. 1916), 182 S. W. 137.

However, mere delay in the shipment of livestock, not unreasonable of itself, is not sufficient to afford an inference of negligence. Dalton v. S. & L. I. M. & S. Ry. (Mo. 1915), 173 S. W. 77, 78.

Although an unexplained delay of eight hours in the movement of a livestock shipment to be transported 90 miles is unreasonable and makes a *prima facie* case of negligence against the carrier.

Hunt v. St. L. I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 61, 63.

A jury may infer without further proof that eight days is an unreasonable time for the transportation of goods by rail a distance of less than 100 miles. Engemann v. Delaware L. & W. R. Co. (N. J. 1916), 97 Atl. 152.

A common carrier of goods, though an insurer of their safe delivery, unless prevented by the act of God or the public enemy, does not insure against delay in delivery, but is merely bound to carry out its contract, and liable for an unreasonable delay. Piero v. Southern Exp. Co. (S. C. 1916), 88 S. E. 269.

No negligence can be imputed to a carrier because of a delay over night at a division point in making connection with a train on the carrier's branch line. Patterson v. C. & A. Ry. (Mo. 1916), 182 S. W. 1034.

Carriers of livestock are not responsible for the usual and ordinary delays incident to the ordinary conduct of their business. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916), 183 S. W. 384.

But where the usual and reasonable time for transportation of a shipment is two or three days, a delay of 40 days makes out a *prima facie* case of negligence and casts upon the delivery carrier the burden of showing that the damage from the delay was not occasioned by it. Central of Georgia Ry. Co. v. Goodwater Mfg. Co., 69 So. 343.

And while mere delay, without more, might be insufficient to support a recovery, it is "enough for the claimant to disclose circumstances sufficient to raise a fair inference of negligence," since the means of showing the cause of the delay is with the carrier and not the shipper. Gregory v. Railroad, 174 Mo. App. 550, 160 S. W. 830.

It is held that slight evidence of

ishable shipments, however, a delay is more serious, because fruits and vegetables will rot and cattle will shrink. Therefore, on a shipment such as these where the weight is heavy and where shrinkage and evaporation, and deterioration, generally run up

negligence is sufficient to support a finding that delay in transportation is unreasonable. McFall v. R. R., 180 Mo. App. 149, 168 S. W. 341; Muir v. R. R., 168 Mo. App. 542, 154 S. W. 877; Lay v. R. R., 157 Mo. App. 467, 138 S. W. 884; Wright v. R. R., 117 Mo. App. 482, 94 S. W. 992.

Unreasonable delays at points en route, wholly unexplained, are sufficient to raise an inference of negligence.

Libby v. Railroad, 137 Mo. App. Loc. Cit. 282, 117 S. W. 659; McFall v. Railroad, *supra*, 181 Mo. App. Loc. Cit. 149, 168 S. W. 341; Hunt v. St. L. I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 61, 62, 63.

It has been said that in order to cast liability upon the carrier for any loss suffered by reason of delay in making the shipment, it must be shown, either directly or inferentially, that the delay was one resulting from the negligence of defendant or its agents and servants. A mere showing of delay is insufficient, for it affords no inference that it was caused by the negligence of the carrier.

Hunt v. St. L. I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 61, 62.

To recover damages for delaying a shipment of livestock, the shipper must show *prima facie* that the delay was caused by negligence of the carrier; mere proof of delay being insufficient therefor. Sikes v. St. Louis & S. F. R. Co. (Mo. 1915), 176 S. W. 255.

This doctrine, however, may well be said to be against the weight of authority. The movements of the train are under the exclusive management and control of the carrier, and the facts which cause the train to be delayed are peculiarly within the knowledge of the officers and agents of the railway company. As was pertinently remarked by the Supreme Court of Washington, in Jolliffee v. Northern Pacific Ry. Co., 52 Wash. 433, 100 Pac. 977: "A car may be sidetracked and delayed for one hour, or for twenty-four hours, by order of the train dispatcher, or somebody in authority hundreds of miles away, for necessity which is apparent to him; and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is sidetracked. There certainly can be no semblance of justice in relieving the party from making a disclosure, who is in a position to make it, or in making an explanation which will excuse it, if there be such an explanation available to him. This court and other courts have frequently said that, where it is necessary to make a character of proof, which by reason of the circumstances surrounding the case is exclusively within the knowledge of one or the other of the parties, the burden

into large amounts, it is very important to ascertain clearly the obligation of the carrier to transport. It may be stated as a general rule that it is the duty of a carrier of livestock or perishable produce to deliver it with a reasonable degree of care and cau-

would be upon the party possessed of that knowledge to make the proof." See, also, note to Cleve. v. Chicago, B. & Q. Ry. Co., 15 Ann. Cas. 33.

To impose upon the shipper the burden of ascertaining the cause of every delay in the transportation of his property and refuse relief in the absence of such proof would be tantamount to denying any right of action for damages resulting from negligent delays in transportation. When the claimant shows the carrier consumes a substantially longer period in delivering his shipment over a route which usually consumes a much shorter time, he meets the burden imposed upon him to make out a *prima facie* case, and calls upon the carrier for explanation, as the party possessing knowledge of the facts which occasioned the delays. In Nelson v. Chicago, B. & Q. Ry. Co., 78 Neb. 57, 110 N. W. 741, the court said: "While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of livestock or other freight, yet, where there is a material delay, the company must, to exonerate itself from liability, show that the delay arose from some cause other than its own negligence." In Bosley v. Baltimore & O. R. Co., 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871, the court quoted with approval from 5 Am. & Eng. Enc. Law (2d Ed.) 254, as follows:

"It seems, however, that on proof of a delay in delivery a *prima facie* case is made out against the carrier, and the burden of proof rests upon it to show that it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier and not easily ascertained by the shipper." In Johnson v. New York, N. H. & H. R. R., 111 Me. 263, 88 Atl. 988, the court said: "If there were no other facts than those already stated, we think a jury would be warranted in saying that there was unreasonable delay somewhere in forwarding and transporting this car of strawberries; the time occupied being fifty-three hours instead of twenty-four hours or less, the ordinary time. It is so far sufficient that it puts the onus of explanation on the defendant." In 4 Elliott on Railroads (2d Ed.), No. 1583, the rule is stated as follows: "The fact that there was unusual delay does not always show a breach of duty. The delay may be so great as to make it proper for the court to adjudge, as matter of law, that it was unreasonable; but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts and circumstances of the particular case, and, as a general rule, the question is one of fact, or of mixed law and fact, for the jury, under proper instructions. Where the delay is an unusual one, and is not explained, it is held to be *prima facie* evidence of

negligence, but that, in case where there is only a slight delay, the rule is different." Tiller & Smith v. Chicago, B. & Q. Ry. Co. (Iowa), 112 N. W. 631.

It must be conceded that the authorities are by no means unanimous in supporting the rule as above announced, as a reference to 4 Rul. Case Law, No. 464, and other texts will demonstrate; but the rule referred to seems supported by the weight of authority. It is certainly the one which is most reasonable and imposes the least hardship. Wall v. N. P. Ry. Co. (Mont. 1914), 145 Pac. 291, 293, 294.

An unexplained delay of four days in transporting potatoes 56 miles raised a presumption of negligence. Watson v. Union Pac. Ry. Co. (Mo. 1915), 178 S. W. 871, 872.

The same, where a stock train is delayed 11 hours in a 225-mile run. Karr v. Baltimore & O. Ry. Co. (W. Va. 1915), 86 S. E. 43, 45.

What is a reasonable time for transportation is a question for the jury, depending upon the facts and circumstances of each particular case, and upon the nature of the freight to be carried. Proof of failure to deliver at the place of destination within the usual schedule time established a *prima facie* case of negligence, and makes it incumbent upon the railroad company to justify the delay. Livestock requires more rapid transportation than coal or lumber, for instance, and it is the duty, as well as the custom of railroad companies to furnish more rapid transportation for the former than the latter. Karr v. Baltimore & O. Ry. Co. (W. Va. 1915), 86 S. E. 43, 45.

Act June 29, 1906, c. 3594, §1, 34 Stat. 607 (Comp. St. 1913, §8651), prohibits interstate carriers from confining livestock in cars, etc., for longer than 28 consecutive hours without unloading them for rest, water, and feeding, unless prevented by storm or other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight. When four car loads of sheep were delivered to a carrier, there remained over 16 hours in which to make delivery, and that time would ordinarily have been sufficient. When the shipment left G., 100 miles from its destination, at which place there were facilities for unloading one car load, there remained 5 hours and 30 minutes, and there was no unloading place between that point and the destination. It was then reasonably expected that the train would make the run within that time. A hot box developed on the engine tender, and another engine was procured, which developed leaks, and the failure of the two engines to work made delivery impossible within the time limit. The first engine had recently been overhauled, and there was no special reason for anticipating a hot box, and the second engine had worked well on its last previous trip; the defect which caused the delay first developing on the run in question. Held, that the delay was caused by accidental or unavoidable causes, which could not be anticipated or avoided by the exercise of due diligence and foresight. United States v. Boston & M. R. R., 228 Fed. 915.

Since each case of delay

must, to a certain extent, depend upon its own facts, it may not be out of place to consider recent specific cases. The Rock Island lines had operated a stock train on Sundays, Tuesdays and Thursdays of each week from Keota, Ia., to Chicago, Ill., for about ten years. The agent at Keota agreed with the plaintiff to furnish a car for this train on one of these days, but that day the train did not run, whereby delay resulted in the hauling of plaintiff's livestock, resulting in shrinkage. Held, the train was not an extra train, but one regularly operated and the contract that the livestock should be transported on a certain day was not an engagement for a special service, prohibited by the Interstate Commerce Act. J. W. Stewart & Son v. C. R. I. & P. Ry. Co. (Ia. 1915), 151 N. W. 485, 487.

A shipper of livestock entered into a special contract with the carrier and, in consideration of a reduced freight rate, agreed that he had examined and found in good order and condition the car provided for the transportation of his livestock; that he accepted the same, and agreed that as thus provided it was suitable and sufficient for said purposes; that in case of delays of trains from any cause he was to feed, water, and take proper care of the stock at his own expense; and that the carrier was not bound to carry the stock by any particular train or in time for any particular market, or otherwise than with as reasonable dispatch as its general business would permit. It was further agreed that, as a condition precedent to the shipper's right to recover any damages for loss or injury to the stock, the owner or person in charge of the stock should give notice in writing of his claim to the agent before the stock was removed from the place of delivery of the same, and before such stock was mingled with other stock. Upon the trial of an action brought by the shipper against the carrier, for damages in the value of one of the animals, alleged to have died, and on account of injuries to others, because they were without food, exercise, or water during the period of transportation, it appeared from the evidence that the plaintiff, before signing the contract, examined the car; that he failed to accompany the stock or make provision for their being fed, watered and cared for; that the stock were loaded at noon, left about three hours after being put upon the car, and arrived at a junction joint at 7:30 p. m., where they remained in the car until the next afternoon, when they were transported by the first scheduled train to their destination, reaching there at 5:30 p. m.; that the stock were transported on the first trains of the carrier scheduled between the initial point and their destination; that the trains were run on schedule time; and that as no written claim, as provided in the contract, was presented to the carrier, it could not be held liable for negligence. Kent v. C. of Ga. Ry. Co. (Ga. 1915), 85 S. E. 1017; Williams v. Central of Georgia Ry. Co., 117 Ga. 830, 43 S. E. 980; Central of Georgia Ry. Co. v. James, 117 Ga. 832, 45 S. E. 223; Ragsdale v. Southern Ry. Co., 119 Ga. 627, 46 S. E. 832; Gilleland v. L. & N. R. Co., 119 Ga. 789, 47 S. E. 336; Southern Ry. Co. v. Tollerson, 135 Ga. 74, 68 S. E. 798.

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In a typical case it was held that while it is ordinarily the duty of the consignee to receive the goods when tendered and dispose of the same for what can be procured for them, and thus minimize the loss, this applies where the commodity has a market value and can be readily disposed of for something of value; but where the article is second-hand, and of little or trifling value and unsalable, and after deducting for trouble and expense for handling the same there is so little left as to be insignificant and trifling and of no importance in value, the jury or judge can consider this in arriving at the damage done. Poore v. Southern Exp. Co. (S. C. 1915), 86 S. E.

As excusing the consignee from accepting. A shipper finished loading and billed out a car of vegetables as Muscatine, Ia., destined to Kansas City, Mo., at 2:30 p. m., October 2, 1911. The carrier had a train leaving Muscatine for Kansas City at 5:57 p. m., on which a car of such freight, if ready, might have been taken. The vegetables were sent out on a train leaving Muscatine at 10:30 p. m., of the same day. The last mentioned train reached Eldon at 10:10 a. m., of October 3, where the shipper's car was set out. The car was there re-iced and remained in the Eldon yard until the next train leaving for Kansas City at 9:05 p. m., of October 3, and arriving at Trenton, Mo., at 8:35 a. m., of October 4. Leaving the last-named station at 10:05 a. m., of that day, it reached Kansas City at 8:05 p. m.; and at 7:00 a. m. of the following day, October 5, it was placed at the team track in the railway yards, where it could be unloaded. When opened up at the team track, the railroad witnesses said the refrigerator was still two-thirds full of ice. It appears, however, that after placing the car in position to be loaded on October 1, until some time during the day or evening after it arirved in Eldon on October 3, the car was not re-iced. At the lowest calculation there were at least four or five hours after the car was billed and before it left Muscatine. According to the shipper's testimony, the time was more than seven hours. At Eldon, it re quired 5,000 pounds to fill the refrigerator. It appeared that under ordinary conditions a shipment of this kind from Muscatine ought to reach its destination in twenty-four hours; and that although the bill of lading did not require the carrier to take the car by any particular train, it was still bound to act in the premises with reasonable promptness and whether it did so act was a question of fact for the jury. A verdict of the jury for the plaintiff was sustained. Blessing v. C. R. I. & P. Ry. Co. (Ia. 1915), 150 N. W. 661.

At 5 p. m., on Tuesday, April 8, 1913, a shipper delivered to the carrier at Moreland, Ky., for shipment to the Union Stockyards in Cincinnati, Ohio, three car loads of cattle. The cattle, which were not accompanied by the shipper, were not delivered to the consignees until 1:45 p. m. on Wednesday, the 9th of April. In the ordinary course of transportation the cattle should have been delivered at the stockyards at 7 or 8 o'clock in the morning of Wednesday, which would have been in time for the sale of cattle on that day. As it was, they were not received until the sales on Wednesday

were over, and consequently the shippers sustained a loss of $311.41. Held, that it was the duty of the carrier to explain the delay satisfactorily and not having done so the verdict should be sustained since the delay was unreasonable and unnecessary on its face. Cincinnati, N. O. & T. P. Ry. Co. v. Myers (Ky. 1915), 178 S. W. 1038, 1039.

A carrier is liable for an unexplained delay of 28 days in the average schedule time in the transportation of a shipment. Detmer-Wallen Co. v. D. L. & W. R. Co., 153 N. Y. S. 287.

In a suit for damages against a terminal carrier for delay in transporting a corpse, where the only evidence of a delivery of the corpse by the receiving carrier to the terminal carrier is found in the shipper's statement that, as the terminal carrier's train was leaving the depot at Washington, he saw the coffin on a truck, in the absence of any evidence showing a course of dealing between these carriers by which placing and leaving a coffined body on a depot truck in the neighborhood of the terminal carrier's track constituted a tender or delivery to it for immediate transportation over its line, no inference can justly arise of a default on its part. Southern Ry. Co. v. Renes (Ala. 1915), 68 So. 987, 989.

But in such a case the burden of proof was upon the shipper to show a tender or delivery of the corpse by the receiving carrier to the terminal carrier in reasonable time for transportation on the shipper's train, as an essential foundation for the breach of duty charged; and, failing to do this, as was the case, a peremptory instruction should have been given for the carrier as requested. Southern Ry. Co. v. Renes (Ala. 1915), 68 So. 987, 990.

Where a corpse was shipped over connecting lines of a railroad, and the train on the terminal carrier left five minutes after the arrival of the preceding carrier it is not chargeable with damages for delay from failure to receive the transportation of a corpse consigned to it and which was on such train. Southern Ry. Co. v. Renes (Ala. 1915), 68 So. 987, 990.

Since the liability of the initial carrier is for any default whatever of any connecting carrier, it is obvious its liability does not terminate with arrival at destination. There may be a delay in delivering as distinguished from a delay in transporting. A contract for transportation of freight includes its reasonable delivery. Reasonable delivery depends upon the conditions existing at the place where the delivery is to be made. Ordinarily the small dealer or manufacturer receives and delivers his freight at the railroad company's warehouse, docks, or sidings. The manufacturer, who from time to time, receives or ships car loads of freight, arranges with the company for a siding, and the freight is delivered at the consignee's siding, or at a particular factory within his works. Under ordinary circumstances such delivery is reasonable, and being generally accorded, it may be required by all similarly situated. By making such deliveries the company does not, however, bind itself to do the impossible, or to make deliveries at other factories where the conditions make such delivery impracticable. N. Y. C. & H. R. R.

Co. v. Gen. Elec. Co., 153 N. Y. S. 478, 485.

So it is the duty of common carriers to maintain reasonable and proper facilities for the interchange of traffic, and for transferring, switching and delivering without unreasonable delay or discrimination, freight or cars destined to any point on their tracks or any connecting line, and the undertaking of the railroad to transfer a car from one switching point to another imposes upon it the obligation of delivering the car to conecting lines without unreasonable delay; and, if it fails in this, and as a proximate consequence the goods became water-soaked and thereby damaged, it is liable. If, on the other hand, it delivers the car without unreasonable delay, and the delivering carrier unreasonably delays in delivering the car and as a proximate consequence the goods are water-soaked and damaged, a case of liability is shown. L. & N. R. R. Co. v. Jones, 100 Ala. 263, 14 So. 114; Mt. Vernon Co. v. A. G. S. R. R. Co., 92 Ala. 296, 8 So. 687; Southern Exp. Co. v. Saks, 160 Ala. 621, 49 So. 392.

In the absence of evidence explaining or excusing a delay, delay in transferring the car from one warehouse to the other where switching is required is unreasonable as a matter of law. C. & N. R. R. Co. v. Luden, 89 Ala. 612, 7 So. 471; Veitch v. I. C. R. R. Co. (Ala. 1915), 68 So. 575, 577.

In a typical case a carrier received an order to transport a car of chops from the warehouse of the consignor to the warehouse of the consignee, the two warehouses being in the same railroad yards. The car was not delivered until three days after the order was given. There was evidence to the effect that the shipment was in good condition when delivered to the initial carrier, and that no rain had fallen on it until 57 hours after the order to transport was given. Held, this evidence was sufficient to go to the jury on the question as to whether the car had been negligently delayed. Veitch v. I. C. R. R. Co. (Ala. 1915), 68 So. 575.

A rather unusual case was one in which an initial carrier held a shipment of roofing in transit for failure of the delivering carrier to pay its charges. While the shipment was held at the junction point the consignee notified the initial carrier that the roofing was needed to cover certain lumber which required to be covered for protection from the elements. The initial carrier refused to deliver the shipment to the delivering carrier for several days, during which period rain fell which damaged the lumber. Held, that the initial carrier was liable for the special damages resulting, since the damages could have been avoided by delivering the goods to the connecting carrier after the carrier received notice of the use to which the roofing was to be placed, and the probable consequences of such failure. The consignee's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to deliver the property, due to the faithlessness of the carrier's agent, at a time when the consequences thereof were fully disclosed. Quanah, A. &

that the owner or consignee should P. Ry. Co. v. R. D. Jones Lbr. Co. (Tex. 1915), 178 S. W. 858.

So a provision in the bill of lading pay the freight before delivery does not authorize the initial carrier to hold the freight in transit until the delivering carrier pays its charges. Quanah, A. & P. Ry. Co. v. R. D. Jones Lbr. Co. (Texas 1915), 178 S. W. 858, 862.

An initial carrier has no right to hold through freight until the connecting carrier pays its charges, especially where it had the right to demand prepayment of charges and did not do so, as the interests of the public require that common carriers settle their disputes either by agreement in the courts or before the Railway Commission. Shippers should not be subjected to delay and damage because of these disputes. Railway Co. v. Lone Star Salt Co., 19 Tex. Civ. App. 676, 48 S. W. 622; Railway Co. v. Lone Star Co, 26 Tex. Civ. App. 531, 63 S. W. 1025; Quanah, A. & P. Ry. Co. v. R. D. Jones Lumber Co. (Texas 1915), 178 S. W. 858, 860.

In this case special damages were awarded because delivery was delayed after the carrier was given notice such damages would accrue. In another typical case a claimant shipped hogs from Kincaid, Ill., to National Stockyards at East St. Louis. The stock was loaded after 11 o'clock in the forenoon, arrived in East St. Louis about 5:30 o'clock the next morning and placed on the tracks of the Stockyards Company at 7:50 o'clock that morning, about a quarter of a mile from the unloading chutes, where they remained until a little after noon, when they were unloaded at these chutes. The market for that day closed at 12 o'clock noon. Five of the hogs were found dead at the time they were unloaded and others were not in good shape. It was apparent from the evidence that this condition was caused, partially at least, by the heat. The proof tended to show that all the hogs, because of the condition in which they were received, had depreciated in weight, and the shipper was compelled to accept a lower price on a declining market because he could not sell in the forenoon of the day when they arrived in East St. Louis. The proof tended to show that shipments of the same kind from Kincaid, Christian county, to East St. Louis, were usually switched and placed at the chutes in question some time between 7 and 9 o'clock the morning after they were shipped from Kincaid. Held, that the verdict of a jury in favor of the shipper would not be disturbed on appeal. Fesser v. C. & I. M. Ry. Co. (Ill. 1915), 108 N. E. 709, 710.

One common method to prove a reasonable schedule is for a shipper to address a letter to the carrier asking what time it will take to transport a shipment between the specified points. Since carriers are always eager for freight a reply is generally forthcoming, which, of course, is admissible. The doctrine of the liability of the carrier for delay is being very broadly construed, so it has recently been held that where neither the carrier nor shipper had any knowledge that a shipment of beans was in an abnormal condition and would spoil after being in a closed car, after four or five days, the carrier is liable for damage to the same caused through

negligence in failing to transport the shipment within a reasonable time although such delay would not have caused damage to beans in a different condition. Lyons v. Grand Trunk Ry. Co. of Canada (Mich. 1915), 152 N. W. 88, 89.

And a railroad is not excused from a penalty provided for not promptly transporting freight by a rule of the State Railroad Commission, which excepts Sundays and legal holidays, where the shipment could have been transported on a Monday and was not because the preceding Sunday was a legal holiday, and the custom in such cases was to observe the following day also as a holiday. Consumers' Lignite Co. v. Houston & T. C. R. Co. (Texas 1915), 179 S. W. 306.

A bill of lading which provides that "agents of this company are not authorized to agree that livestock will reach distination at any specified time or by any particular train" renders nugatory an oral agreement by the station agent to see that a shipment of livestock will reach a certain connecting line of railroad in a designated time. Hill v. Minneapolis & St. L. R. Co. (Ia. 1917), 161 N. W. 144. In action for damages for negligent delay in shipment of livestock, an alleged oral agreement of the local station agent to make connections so that the stock would arrive at intermediate destination at a certain time should have been excluded, since the action was not for deception or false representation. Hill v. Minneapolis & St. L. R. Co. (Ia. 1917), 161 N. W. 444.

However, it should be noted that if the carrier once commences the transportation, it must go through with it. Especially where the shipment is of such a character that a delay may seriously injure it, and the carrier cannot cut the shipment out of a train for some reason or another and place it on a side track to wait for another train, if such a delay will prove detrimental.

In Elliott v. Chicago, M. & St. P. Ry. Co. (S. D. 1917), 161 N. W. 347, the court said, p. 349:

"While, under the contract, appellant did not agree to ship upon any particular train, yet, having started the shipment, it was not entitled to willfully delay the same by cutting the car out of this train and delaying its transmission to a later train that would arrive at the point of destination much later—any contract by which a party sought to exempt himself from liability for willful wrong would be against public policy and void. We use the term 'wilful' as meaning 'voluntary' or 'intentional,' not as implying a willingness or desire to injure. It is a well-established rule of law, supported by every known authority, that, while a carrier may, by its contract, provide that it need not ship a consignment upon any particular train, and that it will not be liable for delays, yet there is in every contract of shipment an implied condition binding the carrier to transport such consignment within a reasonable time. What is a reasonable time depends upon the facts surrounding each particular shipment as such facts are known to the carrier. While evidence of previous or contemporaneous conversations was inadmissible to vary the terms of the written contract, it was admissible to prove what material matters were brought to the carrier's notice.

Under the undisputed facts of this case, the delay in this shipment was unreasonable, and rendered the carrier liable."

Claimant, the owner of two stallions, shipped the same from Aberdeen, S. D., to Miles City, Mont., and brought action to recover damages for unreasonable delay. The carrier accepted the horses but refused to transport them, on the ground that a proper certificate had not been received, it appearing that under the statutes of Montana, before a stallion can be shipped into that state, there must be secured a veterinary certificate that such stallion is free from certain diseases or unsoundness, and a copy of such certificate must be filed with the secretary of the Stallion Registry Board of Montana before the stallion is imported into Montana. The claimant secured the certificate but failed to file it in the office of the secretary. The carrier was not aware of this fact and the authorities of Montana had in no way interfered with the shipment. At a point in North Dakota the carrier set out the car and refused to transport the same into Montana until a different certificate was furnished. Held, having accepted this stock upon the strength of the certificate furnished to it, the carrier could not delay this shipment, after it had begun the same, simply because it changed its mind in regard to the sufficiency of such certificate; the authorities of the state to which the shipment was being made in no manner objecting thereto. Elliott v. C. M. & St. P. Ry Co. (S. D. 1917), 161 N. W. 347; also, see Wilson v. Ala., etc., R. R. Co., 77 Miss. 714, 28 So. 567.

It must be recalled the liabilities of a carrier depend, not only on its contract, but also on obligations imposed by law, and the law imposes the duty upon a carrier to transport and deliver to the consignee within a reasonable time goods which have been entrusted to it. Fla. East Coast Ry. v. Peters (Fla. 1916), 73 So. 151.

In Florida East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151, the court said, pp. 166, 167:

"The plea does not aver that the defendant notified the plaintiff before or at the time it received the several shipments of the circumstances likely to occasion delay, or that it obtained the plaintiff's consent, either express or implied, to the delay. See Joynes v. Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964, wherein it was held:

"'When an emergency arises and a carrier unexpectedly has more business than it can accommodate, and it receives goods without notice to the shipper of the probable delay, and fails to obtain his assent, express or implied, to the delay it is bound to transport the goods within a reasonable time, notwithstanding the emergency.' This case is cited to us by the defendant. As is said in 4 R. C. L. 742, 743: 'But, when an emergency does arise and more business is suddenly and unexpectedly cast on a carrier than he is able to accommodate, unless the carrier declines to receive the excess offered some shippers must necessarily be delayed. In such a predicament, it becomes the duty of the carrier to inform the shipper of the facts at the time of the shipment, or as soon thereafter as they become known, and thereby to afford him the option of acquiescing in the

delay or seeking some other line of transportation; otherwise, if the carrier receives goods without notice to the shipper of the circumstances likely to occasion delay, or fails to obtain his assent, express or implied, to the delay, he will be bound to transport them within a reasonable time, notwithstanding such emergency.' Also, see authorities there cited, especially Daoust v. Chicago, R. I. & P. R. Co., 149 Iowa, 650, 128 N. W. 1106, 34 L. R. A. (N. S.) 637, and Yazoo & M. V. R. Co. v. Blum Co., 88 Miss. 180, 40 So. 748, 10 L. R. A. (N. S.) 432, and the case notes in the two cited volumes of L. R. A. We would also refer to 8 Thompson on Negligence, § 6606; 2 Hutchinson on Carriers (3d Ed.) § 496; 1 Moore on Carriers (2d Ed.) 360; 1 Michie on Carriers, pp. 619, 624, 625; 6 Cyc. 444; Thero v. Missouri Pac. Ry. Co., 144 Mo. App. 161, 129 S. W. 266; Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908; Missouri, K. & T. Ry. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Nelson v. Great Northern Ry. Co., 28 Mont. 297, 72 Pac. 642; Unionville Produce Co. v. Chicago, B. & Q. R. Co., 168 Mo. App. 168, 153 S. W. 63. Also, see our discussion in Seaboard Air Line Ry. v. Rentz, 60 Fla. 429, 54 So. 13, which was an action for the failure and refusal of a carrier to transport freight. 'In other words, this "act of God," as the defendant characterizes it, which continued for a period of practically a month, resulting in an interference with and disturbance of the defendant's use of its telegraph lines and thereby producing a congestion of freight, which caused the delay of the several cars of crate material consigned to the plaintiff, was peculiarly within the knowledge of the carrier, with all of the attendant consequences. Under such existing circumstances, the defendant might well have been justified in refusing the several shipments. The defendand did not see fit to pursue this course, but continued to receive such shipments from time to time during a period of 27 days. By so doing, in order to escape liability to the plaintiff for delay in the transportation and delivery of such shipments, it became the duty of the defendant to notify the plaintiff of such existing conditions. The mere general averment in this plea "that the plaintiff had knowledge of such congested condition of defendant's line of road and the cause thereof before the delivery to the defendant for transportation of the several cars of carrier crates," is not sufficient. See especially Missouri, K. & T. Ry. Co. v. Stark Grain Co., *supra*. For the reasons which we have given, we are of the opinion that this plea does not measure up to the requirements which we enumerated and does not set forth a sufficient defense; therefore no error was committed in sustaining the demurrer which was interposed thereto. We would add that we have carefully examined the cases of Yazoo & M. V. R. Co. v. Blum, 89 Miss. 242, 42 So. 282, 11 Ann. Cas. 272; Yazoon & M. V. R. Co. v. McKay, 91 Miss. 138, 44 So. 780, and Perkins v. Cleveland, C., C. & St. L. Ry. Co., 183 Ill. App. 531, which are cited and relied upon by the defendant, but see nothing therein to cause use to change the cases which we have announced above.'"

Where the evidence shows that

shippers of goods have been shipping for twenty-three years and that a certain train usually arrived at a certain point of destination at about 11:00 o'clock in the morning and that the train containing the shipment, on which the claim was made, did not arrive until 3:00 o'clock in the morning of the following day, such evidence is sufficient to go to the jury on the question of whether there has been an unreasonable delay in transit. Dausen Bros. v. C., B. & Q. Ry. (Mo. 1917), 194 S. W. 743.

What is a reasonable time for transportation relative to the question of negligent delay is a question for the jury, in the light of the circumstances and conditions surrounding and attending the particular shipment, unless the time is concededly so great that there can be no question; and so it is error to instruct that reasonable time means the time usually consumed under ordinary circumstances. Dausen Bros. v. C., B. & Q. Ry., *supra*.

In an action for delay in transportation of hogs intended for exhibition purposes, damages for loss of prize money are not too remote and speculative. K. C., M. & O. Ry. v. Bell (Tex. 1917), 197 S. W. 322.

In a suit for shrinkage of cattle shipped from delay, it was proper to permit testimony of the usual time for shipments over the route of such shipment between the shipping point and destination, although given by a witness who had accompanied only the shipment in suit over such route; it appearing he had accompanied shipments between such points over another route, and that the agent routed the shipment involved upon application for the most direct route. Baker v. Holman (Tex. 1917), 196 S. W. 728.

In such action the account sales rendered by the commission company selling the cattle at destination was inadmissible to show their weight when sold, such account sales not being proven by the commission company, as might have been done by showing such weights were entered in their books in the regular course of business at or about the time the cattle were weighed, from report then made to them by the party weighing such cattle. Baker v. Holman, *supra*.

In an action against a railroad company for the penalty prescribed for violating the Twenty-eight Hour Law, a train dispatcher of another railroad company, whose tracks were used by defendant, must be treated as defendant's agent, where the movement of defendant's trains was governed by such dispatcher. U. S. v. C., St. P., M. & O. Ry. Co., 245 Fed. 179.

Under the Twenty-eight Hour Law, declaring that no railroad or common carrier other than by water, shall knowingly and willfully confine any cattle or other animals for a period longer than 28 consecutive hours without unloading the same for rest, water, and food for a period of at least five hours, unless prevented by storm, or by accidental or other unavoidable cause, which could not be anticipated or avoided by due diligence and foresight, but that on written request of the owner or person in custody of a particular shipment, the time of confinement might be extended to 36 hours, the Government, suing for the penalty

tion.[18] Where the contract of shipment does not obligate the carrier to deliver at a special time or on a special market, an agreement to deliver in a reasonable time is implied, so that no necessary or reasonable delay constitutes a breach of the carrier's duty.[19] So, in an action for damage, through negligence and delay in transporting a shipment of beans, the shippers were required to show negligence arising out of an unreasonable delay, and also that such negligence was the proximate cause of the damage.[20] And in such an action evidence that the shippers informed the carrier's agent as to the time the beans were to be sold at destination was admissible as tending to prove an ele-

prescribed for violation, must show that the carrier knowingly and willfully confined the shipment of livestock beyond the period prescribed; but, having shown the same, it is incumbent on the carrier to show that its failure to unload the livestock was caused by storm, accident, or other unavoidable causes, which could not have been anticipated by due diligence. U. S. v. C., St. P., M. & O. Ry. Co., 245 Fed. 179.

A shipper requested that cattle might be confined for a period of 36 hours without being unloaded. The train on which the cattle were shipped proceeded to within 26 miles of the place where the cattle were to be unloaded. The running time for such 26 miles was about 1½ hours. At that time the cattle had been en route less than 32 hours. The last of the run was made over leased tracks, and the train dispatcher of the lessor company, who directed the movements of such trains, directed the conductor of defendant's train to take a siding at a named station and await the passage of another train. The other train was delayed, and finally, defendant's conductor having communicated with the dispatcher by telephone, was directed to take his train on to the point where the cattle were to be unloaded. Owing to weather conditions, the train had to be cut into sections and brought in one at a time, and for that reason the cattle were confined for more than 36 hours. Held, that the carrier was not liable for the penalty, no violation of the Twenty-eight Hour Law appearing; it not being shown that the carrier willfully and knowingly confined the cattle for more than 36 hours, and it being apparent that the excessive confinement resulted from a storm and other causes over which the carrier had no control. U. S. v. C., St. P., M. & O. Ry. Co., 245 Fed. 179.

18. Kansas City, M. & O. Ry. of Texas v. Corn (Texas 1916), 186 S. W. 807.

19. Kansas City, M. & O. Ry. of Texas v. Odom (Texas 1916), 185 S. W. 626.

20. Van Epps v. Atlantic Coast Line Ry. (S. C. 1916), 89 S. E. 1035.

ment of damage.[21] It could, therefore, be stated that, in the absence of a special contract or special circumstances which take the case out of the general rule, a carrier of livestock is not bound to use extraordinary means to forward a shipment of stock. In such a case the shipper will be held to have consented to the carrying of such stock by the regular trains of the carrier on ordinary schedule.[22]. The carrier is not obliged to attach a car

21. Van Epps v. Atlantic Coast Line R. R. (S. C. 1916), 89 S. E. 1035.

In an action for damages for negligent delay in transporting a shipment of beans, the shippers are required to show negligence arising out of an unreasonable delay, and also that such negligence was the proximate cause of the damage. Van Epps v. Atlantic Coast Line Ry. Co. (S. C. 1916), 89 S. E. R. 1035.

22. Payne v. C., M. & St. P. Ry. (Neb. 1916), 157 N. W. 613.

In the case of Payne v. C., M. & St. P. Ry. Co. (Neb. 1916), 157 N. W. 613, it appeared that the claimant delivered a shipment of livestock to the carrier at Luther, Ia., for transportation to South Omaha, Neb., between 5:30 and 6 o'clock p. m. on May 1, 1911; that the train left shortly thereafter and arrived at Madrid at 6:45 p. m., but did not arrive at Council Bluffs, Ia., until 5:15 p. m., May 2, and was delivered to the Stock Yards chutes in South Omaha at 9:30 o'clock the same evening. It seems that the carrier's printed time schedule showed the first regular freight train due to leave Madrid at 2:30 o'clock a. m., on which this shipment moved. It was sought to hold the carrier liable because it did not operate its trains on a faster schedule, but the court held that the shipper was chargeable with knowledge of what was the regular schedule of the road and could not recover for damages due to shrinkage on the shipment because it did not arrive at the stock yards earlier.

Where the contract of shipment does not obligate the carrier to deliver at a special time, or on a special market, an agreement to deliver in a reasonable time is implied; so that no necessary or reasonable delay constitutes a breach of the carrier's duty. Kansas City, M. & O. Ry. Co. of Texas v. Odom (Tex. 1916), 185 S. W. 626.

It is the duty of a carrier of livestock to deliver it with a reasonable degree of care and caution. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

Where a carrier accepts livestock for shipment, it is its duty to transport it with all reasonable dispatch to destination. Mackin v. Minneapolis & St. L. Ry. Co. (Ia. 1916), 157 N. W. 729.

In an action against a carrier for damage to cattle by delay in transportation, where there was evidence that cattle subjected to delay would lose in weight, and that such delay with confinement in the cars would also cause the cattle to present a bad appearance, which would affect their selling price, an instruction that the

containing livestock to a passenger train in order to move it quicker than its ordinary schedule.[23] In an action against a carrier for injuries to hogs resulting from delay in shipment, evidence that there were unusual delays at three points before the point where the principal delay occurred which the carrier claimed was caused by a snowstorm which constituted an act of God, that two of the carrier's four tracks at the last mentioned place were clear, and that the stock had been in the cars more than thirty-six hours when the train left one of the points where delay occurred, but were not fed, though there were facilities for feeding at that point, is sufficient to show negligence of the car-

plaintiff might recover for any extra shrinkage and bad appearance found to exist was proper. Gulf Coast & S. F. Ry. Co. v. Rodriquez (Tex. 1916), 185 S. W. 311.

In an action against a carrier for damages to cattle by delay in transportation, where there was evidence that a train wreck and consequent delay and confinement for 12 hours caused loss in weight and depreciation in appearance, an instruction that the plaintiff was entitled to recover, although he was able to sell immediately upon arrival, as proper, Gulf Coast & S. F. Ry. Co. v. Rodriquez (Tex. 1916), 185 S. W. 311.

In an action against a carrier for damages to cattle by delay in transportation, failure by the plaintiff to answer questions as to other shipments made by him, on the ground that it had nothing to do with the case, that he did not have his books, and that he did not care to disclose his business, was not prejudicial error, as it would have no weight to discredit or weaken his testimony. Gulf Coast & S. F. Ry. Co. v. Rodriquez (Tex. 1916), 185 S. W. 311.

In a suit for damages and to recover a penalty for the violation of Rev. S. C. 1911, Arts. 6670, 6671, for willfully and wrongfully refusing to deliver goods consigned to the plaintiff, on which freight had been prepaid, to a connecting carrier at the junction for carriage to plaintiff's place of residence, and for violation of the Railroad Commission's rule, requiring a railroad to receive and transport goods legally tendered subject to a penalty for delay, and allowing 48 hours additional at junctions where it is necessary to rehandle goods, where it appeared that the defendants and the connecting carrier had violated articles 6589, 6608, in failing to maintain a depot at the junction for keeping goods, it was no defense that they were carried beyond to a point on defendant's railroad and there retained for failure of the connecting carrier to settle advance charges on the goods previously delivered to it, and for delivery only on payment of the freight to the junction point. Quanah, A. & P. Ry. Co. v. Moore (Tex. 1916), 189 S. W. 322.

23. Payne vs. Chicago, M. & St. P. Ry. (Nebr. 1916), 157 N. W. 613, 614.

rier.[24] Where a carrier of livestock, upon arrival of the shipment at a connecting point, repairs the cars containing part of the shipment as soon as possible and delivers the whole shipment to the connecting road as quickly as a person of ordinary prudence, similarly situated, would do under the same circumstances, it is not liable for a delay in transportation, though the cattle were injured by heating by the stoppage.[25] Where a shipment was subject to delay on account of a bridge of a connecting carrier being out, a contract that the shipment was subject to delay on account of the bridge, not agreed to before the shipment was accepted for transportation, was without consideration, and the claimant's subsequent ratification could not give it vitality.[26] Of course the question as to the particular time a shipment ought to take to reach a certain point is one which must depend upon a variety of circumstances. Not alone are the normal demands upon the carrier's facilities to be considered, but the character of the freight is of paramount importance.[27] Of course, one way to prove what is a reasonable time is by what has been referred to as the so-called "parallel rule," under which the time it takes shipments, sent either on the same day as the one in question, or the same time of the year, is used as a method of computation. Then evidence of railroad

24. Tobin v. Lake Shore & M. S. Ry. Co. (Mich. 1916), 159 N. W. 389.

25. Ft. Worth & D. G. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

Where it appeared a carrier delayed a shipment of live stock about twelve hours owing to the breaking of a rod in the boiler, and unloading and feeding the stock, in an action for such delay in transportation such evidence *held* not to support the finding of a period of delay which could have been avoided by the exercise of ordinary care. Kansas City, M. & O. Ry. Co. of Texas v. Odom (Tex. 1916), 185 S. W. 626.

Evidence by a shipper that live stock is delayed in transit several days and become sick and bruised is sufficient to carry to the jury the question of the carrier's negligence, although it introduced evidence of proper handling. Bernstein v. Yazoo & M. V. R. R. Co. (Miss. 1916), 72 So. R. 132.

26. Bowles v. Quincy, O. & K. C. R. Co., (Mo. 1916), 187 S. W. 131.

27. An unnecessary delay of 18 hours in the transportation of a car of poultry over a line of railroad is sufficient to warrant instruction concerning the negligence of the carrier in the transportation of the car. Stewart Poultry Co. v. Erie R. Co. (Kansas, 1917), 163 Pac. 448.

operating men who, from a knowledge of motive power and traffic conditions, can testify what would be a reasonable time, might be acceptable. So shippers who have been making the same kind of shipments within the points in question for a number of years, can testify as to the time it usually takes for a shipment to move between these points. Of course, the printed schedules of the railroad are always admissible in evidence as an admission against interest of what is a reasonable time.[28] Dam-

28. March 13, 1912, claimant shipped a car of poultry from Winifred, Kansas, to New York City which was delayed in transportation so that it was not delivered until 9:55 A. M. Thursday, March 21st, whereas it should have been delivered so as to reach the market on March 20th. The bill of lading provided that the carrier did not agree to transport the property in time for any particular market. *Held* that the carrier was negligent and the claimant could recover. The inspectors of the carrier and its car repairers who inspect at the junction point as well as the caretaker and consignee are competent to testify as to the time the car reaches various points. Stewart Poultry Co. v. Erie R. Co. (March, 1917), 163 Pac. 448, 449.

In K. C., M. & O. Ry. Co. of Texas v. James (Tex. 1916), 190 S. W. 1136, the court said, p. 1139:

"It will be recalled that the Supreme Court in the case of Houston & Texas Central Railway Co. v. Roberts, 101 Tex. 418, 108 S. W. 809, held that a witness' testimony, in effect, that 'runs' previously made within a certain time 'would be a reasonable time to make the trip,' constituted an answer involving a mixed question of law and fact; that the witness must first determine for himself what would constitute ordinary care, and then have deduced from a consideration of all the elements that would enter into his opinions on the question of reasonable time, a conclusion as to what that time should be. If a witness is unable to state that certain runs would constitute a reasonable time within which to make a trip, then this witness would certainly be unable to state the difference in the value of the cattle on account of a difference in appearance; one element of his conclusion being based upon a good run or a reasonable run. He would be unable to state in the first instance what a reasonable or a good run or what reasonable time would have been. The following authorities hold the character of testimony discussed as improper: T. & P. Ry. Co. v. Jones, 58 Tex. Civ. App. 132, 124 S. W. 194; K. C., M. & O. Ry. Co. v. Bigham, 138 S. W. 432; K. C., M. & O. Ry. Co. v. Beckham, 152 S. W. 229; T. & P. Ry. Co. v. McIntyre, 152 S. W. 1103; T. & P. Ry. Co. v. Crowder, 157 S. W. 281; T. & P. Ry. Co. v. Tomlinson, 157 S. W. 278; H. & T. C. Ry. Co. v. Hawkins, 167 S. W. 190; I. & G. N. Ry. Co. v. Hamon, 173 S. W. 613; P. & N. T. Ry. Co. v. Holmes, 177 S. W. 505; F. W. & D. C. Ry. Co. v. Gatewood, 185 S. W. 932; K. C., M. & O. Ry. Co. v. Corn, 186 S. W. 807."

age from a decline in market price during delay in transportation of livestock is not within the provision of the contract of shipment for notice of claim for loss or injury to stock during transportation.[29] A statement in a shipping contract that the carrier will not be liable for "any loss, injury or damage for which it may be responsible" in excess of $100 per animal, refers solely to loss, injury or damage to the property itself and does not refer to damage by delay.[29½] The importance of prompt transportation under modern commercial methods is apparent when it is considered that only recently a court laid down the doctrine that for unreasonable delay in transit, the purchaser of goods has a right to rescind the sale and the seller has a right of action against the carrier.[30] Furthermore, where delay in the delivery of a shipment causes the consignee a loss equivalent practically to its value he may refuse to receive it.[31] The entire matter seems, however, to be authoritatively settled by a recent decision of the United States Supreme Court. Carriers often defend claims for loss due to delay on the ground that the uniform bill of lading provides that the carrier does not agree to transport the shipment by any particular train or in time for any particular market.[32] There is some diversity of opinion among the state courts whether such a provision is valid. It has been held that in an action for negligent delay in the transportation of livestock it is proper for the court to refuse to charge the jury that the carrier is not required to move cattle within any particular time or for any particular market. On the other hand it has been said if there has been unreasonable delay in a shipment of livestock caused by the negligence of the carrier or by its servants, proximately resulting in loss and damage to the owners, stipulations in the livestock contract that they were not to be transported within any specific time, nor delivered at destination at any particular hour, nor in season for any particular market, and

29. Panhandle & S. F. Ry. Co. v. Bell (Tex. 1916), 189 S. W. 1097.

29½. Elliott v. C. M. & S. & P. Ry. (S. D. 1917), 161 N. W. 347.

30. Isbel-Brown Co. v. Stevens Grocer Co. (Ark. 1915), 175 S. W. 1158, 1159.

31. Central of Georgia Ry. Co. v. Goodwater Mfg. Co., 69 So. 344.

32. G. C. & S. Ry. Co. v. J. A. Bowers & Son (Tex. 1915), 175 S. W. 861, 862.

to be fed and cared for at the owner's expense, while in the carrier's hands, does not furnish a ground for the carrier for avoidance of liability, for, while not under obligation to transport the livestock to destination in any specified time it was its duty to transport them within a reasonable time, for a negligent breach of which duty it may be held liable for the resulting loss and damage.[33] The method of proving what is a reasonable time for transportation is not necessarily the puzzling question it is supposed to be. Previous shipments made by the carrier between the same points, schedules published by the carrier, statements by its agents as to the time of transportation, experience of other shippers from the same locality, are all competent evidence to show what is a reasonable time. Very recently it was held that in an action for injuries through delay it is competent evidence for the shipper to prove that a shipment made by another shipper from the same point of origin arrived at destination a day earlier.[33½] The case of the N. Y. P. & N. R. R. Co.

33. Hunt v. St. L., I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 61, 62.

33½. Norfolk & W. Ry. Co v. A. J. Steele & Son (Va. 1915), 86 S. E. 124, 127.

The time required by a common carrier other than the defendant to transport goods between two points is evidence of the time that ought to be taken by the defendant. Engemann v. Delaware, L. &. W. R. Co. (N. J. 1916), 97 Atl. 152.

Evidence that a shipment of live stock arrived several hours later than usual time taken in connection with testimony of shipper that he took a passenger train after live stock train and did not see any washout or cause for delay makes a prima facie case for delay on the part of the carrier. Sikes v. St. Louis & S. F. R. Co. (Mo. 1915), 176 S. W., 255.

A common carrier is bound to deliver the property which he undertakes to transport at the point of discharge safe and uninjured at the peril of liability, except where the injury has resulted from some cause excepted in a contract (other than negligence), which is a matter of defence, the onus of proving which is upon the carrier. The shipper has nothing to do but to show the injury, and the carrier becomes at once prima facie liable, and remains so until he shows that said injury resulted either from an act of God, the public enemies, or a cause from which he has exempted himself legally in a special contract. Also see Johnstone v. Railroad, 39 S. C. 55, 17 S. E. 512. Piero v. Southern Express Co. (S. C. 1916) 88 S. E. 269, 271, 272.

In an action instituted by a shipper of perishable goods against a common carrier, on account of the defendant's breach of duty to safely

v. Peninsula Produce Exchange of Maryland, 240 U. S. 34.[34] finally settles one of the disputed questions of section three of the uniform bill of lading. Section three provides among other things as follows: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon." Attorneys for shippers have always contended that this provision really did not mean anything. The carrier's liability at common law was to transport the goods within a reasonable time. It was held that what was a reasonable time was a question for the jury to

and promptly transport the goods and deliver the same to the consignees at destination, where it is alleged that the carrier received the shipment in good order, and did not properly take care of the goods, and did not safely and securely carry and convey them, and did not deliver them in good order; particular acts of negligence need not be alleged. Louisville, etc., R. Co., v. Warfield & Lee, 129 Ga. 473, 59 S. E. 234. Louisville & N. R Co. v. McHan (Ga. 1916), 87 S. E. 889, 890.

34. 36 Sup. Ct. 230; 60 L. Ed.

The state decisions generally affirm the doctrine that carriers of live stock and perishable produce are held to a stricter schedule of transportation than in the case of other freight.

The fact that shippers rely on reaching a certain market by a definite time is also of considerable weight.

Hunt v. St. L., I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 62

Wall v. N. P. Ry. Co. (Mont. 1914), 145 Pac. 291.

Watson v. U. P. R. R. Co. (Mo. 1915), 187 S. W. 871.

Karr v. B. & O. R. R. Co. (W. Va. 1915), 86 S. E. 43.

Blessing v. C. & T. P. Ry. Co. (Ia. 1915), 150 N. W. 661.

C. N. O. & P. Ry. v. Myer (Ky. 1915), 178 S. W. 1038.

Veitch v. I. C. R. R. (Ala. 1915), 68 So. 575.

G. C. & S. Ry. Co. v. Bowers & Son (Tex. 1915), 175 S. W. 861.

Hunt v. St. L., I. M. & S. Ry. (Mo. 1915), 173 S. W. 61.

Norfolk & Western Ry. Co. v. Steele & Son (Va. 1915), 86 S. E. 124.

Lyons v. G. T. Ry. Co. (Mich. 1915), 152 N. W. 88.

The foregoing cases discuss the provision referred to in the bill of lading and hold that while the carrier is not an insurer of a schedule, it is nevertheless bound to transport with reasonable promptness and whether it does so in a particular case is a question of fact for the jury.

It has also been held that in an action for injury through delay, it is competent evidence for the shipper to prove that a shipment made by another shipper from the same point of origin arrived at destination earlier. Norfolk & W. Ry. v. Steele & Son (Va. 1915), 86 S. E. 124.

decide after taking into consideration all the facts of the case. Thus in the case of perishable produce, a reasonable time would mean greater expedition than in the case of coal. The carriers, however, have taken refuge behind this provision in the bill of lading in declining claims for delay. The facts in the case were as follows: On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York City. The property was delivered at destination some hours later than the customary time of arrival and suit was brought to recover damages for failure to make the market. On the ground that by failing to make the market, the railroad did not transport with reasonable dispatch, the shipper secured a judgment in the Court of Appeals of Maryland, 122 Md. 215, 89 Atl. 433. An appeal was taken to the Supreme Court of the United States on two questions, which were as follows: 1. Does the Carmack amendment impose on the "initial carrier" liability for delay occurring on the line of its connection without physical damage to the property? 2. Was the shipper entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, which provided that: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon." The Supreme Court held that under the Carmack amendment the initial carrier was just as liable for damages due to delay on the line of a connecting carrier as for any other damage. Concerning the second question, that is, liability for failure to meet the market, the court said that it was the duty of the jury to award damages for failure to transport with reasonable dispatch and if the jury found that it was not reasonable dispatch to make the market on a certain date, it was justified in awarding damages for such failure. The Supreme Court, however, did not directly pass on what would be the correct measure of damages. It appeared that in the trial court a wrong measure of damages had been used but the case was not reversed on this

account because the state court held the railroad had not been injured by using the wrong measure of damages and the Supreme Court of the United States held that the determination of this question involved no federal question. The correct measure of damages in case of a delay in transit which results in a decline in the value of a shipment on arrival is the difference between the actual value of the shipment at the time it should have arrived and the actual value of the shipment at the time it actually did arrive.

Evidence of Unreasonable Delay. To prove unreasonable delay it is always relevant to show the customary time of transportation between the points involved, and how long it took the carrier to transport other shipments under the same conditions, as well as to show what its customary schedule was.[34½] When it is shown that the carrier took a longer time than customary to transport the shipment, the burden then rests upon it to show an excuse for such delay. Evidence of delays in transportation of livestock, one of two hours, one of seven hours, two of twelve hours each, and one sixteen hours, with no reasons given therefor except the first, is sufficient to support a finding of negligent delay, even assuming that parts of some of them were to enable compliance with statutes as to feeding and watering.[35] So, although a contract limiting liability of a carrier for negligence in respect of delay in transportation casts the burden of showing negligence on the shipper, and a slight delay does not make a prima facie case, the shipper need not show a distinct culpable act, so that where several cars of stock were seventy-six, sixty-two and fifty-three hours in covering a distance usually requiring thirty to thirty-six hours, there was an unreasonable delay sufficient to raise an inference of negligence and shift the burden to the carrier to show that the delay was beyond its control, unavoidable, or a necessary incident to the proper operation of its railroad.[36] And, in an action for damages to a shipment of livestock, where there was no evidence as to what was an ordi-

34½. See note 33½, supra.

35. St. Louis, B. & M. Ry. Co. v. Marcofich (Tex. 1916), 185 S. W. 51.

36. Louisville & N. R. Co. v. Montgomery (Tenn. 1916), 188 S. W. 1146.

narily reasonable time for the transportation of cattle between two points, the question as to what was a reasonable time should not have been submitted to the jury.[37] In other words, where so-called parallel shipments are shown, that is, the time taken to transport other shipments, conditions must be shown to be similar. In line with this it may be noted that in the absence of evidence that other shipments by the plaintiff were subjected to the same conditions as the shipment in question, evidence of the result to those shipments was inadmissible.[38] In Johnston v. Chicago, B. & Q. R. Co., 70 Neb. 364, 97 N. W. 479, the court said: "In order to recover damages for an alleged delay in the shipment of livestock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose.[39]

5. **Embargoes.** A great many claims for damages have arisen because of the failure of a carrier to transport shipments owing to embargoes on connecting lines. For instance, during an extraordinary congestion of freight a carrier may refuse to accept shipments from connecting lines. This can sometimes result in serious injury to shippers who have made contracts dependent upon delivery and who thereby suffer special damages. Since it is the duty of a carrier to provide adequate facilities, which means adequate terminals as well as other facilities, the validity of an embargo caused through congestion of freight, which does not arise because of some extraordinary condition, such as a flood, may well be doubted.[39a] It seems clear, however,

37. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

38. Gulf, C. & S. F. Ry. Co. v. Rodriquez (Tex. 1916), 185 S. W. 311.

39. Also see Payne v. Chicago, M. & St. P. Ry. Co. (Nebr. 1916), 157 N. W. 613.

39a. In re Lake and Rail Butter and Eggs, 29 I. C. C. 45, the lake lines embargoed butter and eggs, fresh meat, and live and dressed poultry on the ground that they were not equipped to take these commodities. It will be noted that these commodities require a special and expedited service. The Interstate Commerce Commission, in a very strong ruling, held this embargo was illegal and it was the duty of the water carriers to transport these shipments.

that it is a question of fact for a jury to pass on whether the congestion of freight is one that could reasonably have been foreseen by the carrier. At all events, it certainly is the duty of the carrier to give reasonable notice of embargoes to shippers.[39b]

6. **Congestion of Freight.** That the volume of freight traffic over a carrier's lines and other railroad lines was extraordinarily large, so that the carrier, though having all necessary facilities for the handling of ordinary traffic, was unable to care for the enormous and unusual volume of freight tendered, without delay, did not excuse the delay in delivery of a shipment, where it accepted the shipment, knowing of the conditions reasonably likely to delay delivery, but gave the shipper no notice thereof, as a shipper is not bound to know of such conditions, and, the conditions being peculiarly within the carrier's knowledge, it is bound to notify the shipper.[40] And when an emer-

39b. Judging from analogous cases, it appears to be the duty of a carrier to give the shipper embargo notices when it is familiar with the method of shipping used by such shipper and knows of its ordinary destination points.

Colorado Coal Traffic Assn. v. C. & S. Ry. Co., 24 I. C. C. 618.

New York Hay Exchange Assn. v. L. V. R. R. Co., 29 I. C. C. 90.

Berger-Crittenden Co. v. C. M. & St. P. Ry. Co. (Wis. 1915), 150 N. W. 496, 503.

Riddle, Dean & Co., v. Baltimore & Ohio R. R. Co., 1 I. C. C. 701. Also see next note.

40. Burns Grain Co. v. Erie R. Co., 168 N. Y. S. 154.

In Burns Grain Co. v. Erie R. Co., 168 N. Y. S. 154, the court said, pp. 155, 156:

"In this action the plaintiff demands damages from the defendant, a common carrier, on account of claimed tardy delivery of merchandise. The defendant has answered, and to the third separate defense set up in the amended answer the plaintiff demurs, on the ground that the said defense is insufficient in law.

"In considering this defense I have examined some of the authorities, but will mention only two, namely, the Geismer Case, 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837, and the Blackstock Case, reported in 20 N. Y. at page 48, 75 Am. Dec. 372. As distinguished from both these typical cases, the failure to deliver in the usual time in the case now before me is claimed in the answer to be due neither to mob violence, or the like, on the one hand, nor to mere failure of employes of the carrier corporation to do their duty; but the claim is in the main that:

"'At all times mentioned in the complaint the volume of freight traffic over the defendant's lines (and over many other railroad lines) was extraordinarily large, and that, although this defendant had all necessary facilities on hand for ordinary

gency arises and a carrier unexpectedly has more business than it can accommodate, and it receives goods without notice to the shipper of the probable delay, and fails to obtain his assent, express or implied, to the delay, it is bound to transport the goods within a reasonable time, notwithstanding the emergency.[41]

traffic, it was physically impossible to care for the enormous and unusual volume of freight tendered to it at all the times mentioned in the complaint.'

"The further allegation is made that any delay was not due to negligence in the carrier, but solely to the aforesaid congestion of freight traffic. So the question arises whether, under this answer, a condition is made to appear whereunder a railroad was entitled to take freight for carriage, knowing that business conditions were such that delivery could not be made within the usual time, and this without notifying the shipper of such situation. It may be that, had the carrier accepted these goods for transportation under normal conditions, and thereafter and prior to the commencement of the carrying abnormal conditions such as are pleaded arose, delay in delivery might have been excusable. But in the case at bar, under the conditions made manifest by the portion of the answer in question, the defendant, when it accepted the goods, knew of such conditions reasonably likely to delay delivery, and, knowing such conditions, accepted the goods for transportation without comment. I believe that under such circumstances a shipper is not bound to be apprised of unusual conditions affecting railroad traffic, and that, such conditions being peculiarly—and here admittedly — within the knowledge of the carrier, the latter was bound to at least notify the shipper of possible delay before accepting the goods for carriage."

And when an emergency arises and a carrier unexpectedly has more business than it can accommodate, and it receives goods without notice to the shipper of the probable delay, and fails to obtain his assent, express or implied, to the delay, it is bound to transport the goods within a reasonable time, notwithstanding the emergency Fla. East Coast Ry. v. Peters (Fla. 1916), 73 So. 156.

But what is a reasonable time for a common carrier to transport a shipment in depends upon the facts surrounding each particular shipment as they are known to the carrier. Elliott v. C., M. & S. P. Ry. (S. D. 1917), 161 N. W. 347.

41. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 156.

Since the war began, carriers have frequently sought to excuse delay as the ground of a heavy congestion of freight. But this was a condition that arose shortly after the Great War started and has continued ever since. In spite of the congestion, the carriers still accepted all freight tendered, without notifying shippers of the congestion on their lines. The courts, almost unanimously, hold that under such circumstances the carrier is absolutely liable for delay. This doctrine may seem rather novel, but is well settled and grounded on logical principles of law. So in an ac-

7. Loss by Fire. Very often cars burn either while awaiting transportation or while awaiting delivery. In the former case it has been held that where a shipper owning an elevator situated on a switch track, loaded a car with corn, which the carrier moved to a convenient point for placing in its train, where it was destroyed by fire over night, there is a delivery to the carrier, and it is liable for the loss although no bill of lading was in fact issued. The Carmack Amendment, although providing that a bill

tion for damages to perishable goods from late delivery, defended on ground of congestion, the carrier failed to excuse delay, where it was not shown that the congestion was due to temporary conditions, or that the carrier did not have knowledge thereof at the time of shipment, and could not have notified the shipper, or that, despite congestion, the particular perishable goods could have been moved with greater promptness. Meany & Saisselin v. Erie R. Co., 173 N. Y. S. 96.

In Conover v. Wabash Ry., 208 Ill. App. 105, the court said, p. 109:

"It is argued that a carrier is only liable for unreasonable delay, and that at the time this shipment was accepted by appellant the great congestion existing at Baltimore over the lines of railroad entering that city prevented the prompt transit of the grain in question; that the congestion was brought about by conditions directly attributable to the European war, the demand of European nations for foodstuffs, the large crops raised and the rush of such commodities to Baltimore and the impossibility of securing ships because of conditions brought about by the war.

"The rule is settled that where a carrier receives freight, unusual press of business or congestion will not excuse delay unless the shipper was notified at the time the shipment was received of such congestion. 'By the mere act of accepting the freight without explanation, the company undertook to transport and deliver it within a reasonable time. * * * The company knew that its lines were in such condition as to incapacitate it for performing its full duty as a common carrier by delivering goods not only in safety, but in a reasonable time. In order to save itself from liability, it should have disclosed to the shipper the condition of its road.' Appellant was guilty of negligence in accepting the grain for shipment when it knew, or ought to have known, it could not transport it to its destination within a reasonable time. Great Western Ry. Co. of Canada v. Burns, 60 Ill. 284; Illinois Cent. R. Co. v. Cobb, Christy & Co., 64 Ill. 284; Tate v. Missouri Pac. R. Co., 157 Ill. App. 106; Eastern Ry. Co. of New Mexico v. Littlefield, 237 U. S. 140; 4 R. C. L. 742.

"A showing of such notice of unusual conditions or congestion as is possessed by the public generally is insufficient to relieve from liability for delay; the shipper must be notified by the carrier. Missouri, K. & T. R. Co. of Texas v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Daoust & Welch v. Chicago, R. I. & P. R. Co., 149 Iowa 650, 34 L. R. A. (N. S.), 637, and note."

of lading shall be issued, does not provide that liability shall not attach until issued. [42]

8. Damage by Flood. As previously noted a flood is not necessarily an Act of God, so as to relieve a carrier from liability. Only recently it was held that where freshets were to be expected at certain seasons of the year the fact that freight was damaged from a tremendous flood, although not an unprecedented one, was not such an Act of God as relieved the carrier from liability. [43]

42. Morrison Grain Co. v. M. P. Ry. Co. (Mo.) 170 S. W. 404.

It has been held that the failure of a carrier to move a carload of lumber after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault. Green v. Louisville & N. R. Co., 163 Ala. 138. Moore on Carriers, 3rd Ed., p. 320. Also see Osborne v. So. R. R. (N. C. 1918), 96 S. E. 34; Sheppard Cotton Co. v. N. O. N. & C. R. R. (Miss. 1918), 78 So. 193; Yazoo & M. V. R. R. v. Craig (Miss. 1918), 79 So. 192.

But it has also been said that a common carrier is not liable for injury to a shipper's goods by a fire, for which it was not responsible, although the goods were exposed to injury by negligent delay in transmission, as the delay cannot be deemed the proximate cause of the injury. Moore on Carriers, 2nd Ed., p. 318; and cases cited.

43. International & G. N. Ry. Co. v. Penney (Texas 1915), 178 S. W. 970, 971.

A carrier is not liable for loss or damage to goods while in its possession, occasioned through an act of God, such as a flood; but the act of God which would excuse a common carrier for loss of or injury to goods must be the immediate or proximate, and not the remote cause of the loss. Moore on Carriers, 2nd Ed., p. 318.

But it is not essential to the exemption of a carrier from liability for loss of or injury to goods during their transportation, that the damages result solely from any one of the exceptional causes, such as the act of God or a public enemy, or the sole fault of the owner, it not being liable if two or all of such causes combine to produce the injury, if the carrier itself is without fault. Where a common carrier merely fails to make prompt delivery of goods, and they are thereby lost in an unprecedented storm, it will be protected from liability, the act of God, and not its negligence, being the proximate cause. Moore on Carriers, 2nd Ed., p. 318; and cases cited.

Whether the loss of goods intrusted to a common carrier is to be attributed to inevitable necessity not arising from the intervention of man and which no human prudence could have avoided, is a question of fact for the jury. Moore on Carriers, 2nd Ed., p. 319.

Other instances pro and con are as follows:

As between a failure without proper cause to deliver goods from a

9. Loss Through Freezing. Considerable controversy has arisen concerning liability for loss occasioned by freezing. Some shippers believe that the carrier is liable for all such damages. On the other hand many carriers contend that freezing is an act of God which relieves them from liability. A great many freezing claims arise in the case of shipments of perishable produce

freight depot upon demand at a time when there was no reasonable ground to apprehend damage by flood and an unprecedented flood which a day later submerged the depot and damaged the goods, the flood, and act of God, and not the failure to deliver, was the proximate cause of the damage.

Atchison, etc., Ry. Co. v. Henry, 78 Kan. 490, 97 Pac. 465, 18 L. R. A. (N. S.) 177.

Where the flood which injured a shipment of eggs appeared so suddenly and with such magnitude and force that its advent could not be anticipated nor its consequences averted by the exercise of human care and foresight it was the proximate cause of such injury, and negligent delay if any, of the carrier in transporting the eggs, whereby they were exposed to the flood, was but the remote cause.

Lightfoot v. St. L. & S. F. R. Co., 126 Mo. App. 532, 104 S. W. 482.

A carrier is not liable for a loss of property in shipment through an act of God, which could not reasonably have been foreseen, although but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger, and the loss would not have occurred. In such case the negligence is not the proximate cause of the injury.

Empire State Cattle Co. v. Atchison, etc., Ry. Co., 135 Fed. 135, judg. aff'd 147 Fed. 457, 77 C. C. A. 601, and 147 Fed. 457, 77 C. C. A. 607.

Delay of a carrier in transporting goods, whereby they come in the path of a flood, and are destroyed by an act of God, is not a proximate cause of their injury.

Elam v. St. L. & S. F. R. Co., 117 Mo. App. 453; 93 S. W. 851.

Negligent delay of a carrier in moving goods, not so unreasonable as to amount to a cenversion, will not render it liable for the loss of goods after they have been carried to their destination and are there destroyed by an act of God before their delivery.

Rodgers v. Missouri Pac. Ry. Co., 88 Pac. 885.

Where the negligence of a carrier operates as a contributive element proximate to injury to goods, even though such injury is to some extent caused by the act of God, the carrier is liable as though the negligence was the entire cause of the loss.

Gratiot Street Warehouse Co. v. Missouri, etc., Ry. Co., 124 Mo. App. 545, 102 S. W. 11.

Where a consignment of flour was delivered to a carrier for shipment and was retained four days before being forwarded, the carrier was liable for the damage caused by a cyclone on the morning of the next day after its arrival at its destination, since the negligence of the carrier,

moving in ventilator cars. If the shipper directs that the vents be left open and the goods are frozen as a result, the carrier claims that the damage is the fault of the shipper. If the shipper

resulting in the delay at the place of shipment, continued to be an active cause until the consignee had a reasonable time after their arrival within which to remove the goods.

Alabama G. S. R. R. Co. v. J. A. Elliott & Son, 150 Ala. 381; 43 So. 738, 9 L. R. A. (N. S.) 1264.

In Bell vs. Pac. R. Co., 177 Ill. App. 374 it was held that there was negligence of the carrier in the failure to properly care for cattle shipped from Rock River, Wyoming, to South Omaha, Nebraska. A severe snow storm delayed the shipment enroute causing the loss of some of the cattle and depreciation of the rest. Some of this loss could have been prevented by greater care of the carrier and a judgment for the shipper was sustained on the ground that the severe snow storm, though an act of God and the proximate cause of the damage, was so mingled with the negligence of the carrier as not to relieve the railroad from liability.

On February 12, 1907, the E. M. Leonard Produce Co. shipped a car of potatoes from Ault, Colorado, to Los Angeles, California. There was a delay in transshipment to a connecting carrier of four days at Salt Lake City so that the car was not moved from Salt Lake City until February 22nd, and was stopped at Lund, Utah, by a wash out on the line which occurred there on the 22nd. The Court held that under the stipulated facts the car would have reached Ault, Utah, on the 18th or 19th but for the negligence of the carrier and sustained a judgment for the shipper over the defense of an act of God.

Leonard Produce Co. vs. U. Pac. R. R. Co., 180 Ill. App. 415.

Where the baggage of a passenger from Cincinnati to New York was by error of the carrier forwarded by a slow train when it should have been sent on the through express and the train containing the baggage was overtaken by an unusual and unexpected flood by which the baggage was destroyed the court held that:

"The Act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the Act of God if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In line with this principle many authorities hold that where the unnecessary delay of the carrier subjects the goods in his possession to a loss by an Act of God which they would not otherwise have met with, the delay is of itself such negligence as will make him liable for the loss. We are inclined to think that this is the correct doctrine.

Wald vs. Pittsburgh C. C. & St. L. R. R. Co., 162 Ill. 545.

In Ormsby vs. Union Pacific R. R. Co., 2 McCrary (U. S.) 48 Fed. 705, a delay of one day was held to be unnecessary and negligent on the part of the carrier and to entitle the shipper to judgment for the loss.

"The loss must be the proximate result of a cause as to which the car-

directs the vents be kept closed and the weather turns warm suddenly, the produce heats and as a result spoils, then it is also claimed that this is the fault of the shipper. However, a shipper

rier has exempted himself from liability in order that he shall be relieved under such exemption and the excepted cause of liability must be the sole cause of the loss, for if the negligence of the carrier mingles with it as an active and co-operative cause the carrier will be responsible."

Also see 6 Cyc. 397 and note 90.

In Green-Wheeler Shoe Co. vs. Chicago, Rock Island & Pacific Railroad Company reported in 5 L. R. A. (N. S.) 882; 106 N. W. 498, an Iowa case, the point is squarely decided and thoroughly considered. The Court said:

"We have presented for our consideration the simple question whether a carrier who by a negligent delay in transporting goods, has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss. * * * In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. * * But in an action of tort, and the present case is of that character, recovery is not limited to the consequences within the contemplation of the parties, or either of them but includes all the consequences 'resulting by ordinary natural sequence, whether foreseen by the wrong doer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued'. * * Now while it is true that the defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen as any reasonable person could foresee that the negligent delay would extent the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. * * It is not sufficient for the carrier to say by way of excuse that, while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost, it might have subjected them to some peril just as great. He cannot speculate on mere possibilities."

To the same effect see the following cases:

Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co., 69 L. R. A. 509.

National Rice Milling Co. vs. New

of perishable produce is justified in acting upon the belief that his shipments will be transported in the usual time and as a matter of law it is not negligence for him to direct that the ventilators be kept closed to prevent damage by freezing. [44] So it is the duty of

Orleans & C. R. Co., 132 La. 615, 34 Ann. Cases 1099.
Am. & Eng. Enc. of Law (2nd Ed.) ol. 13, Page 722.
A. G. S. R. Co. vs. Elliott, 150 Ala. 381 A. L. R. A. (N. S.) 1264.
A. G. S. R. Co. vs. Quarles, 145 Ala. 436, A. L. R. A. (N. S.) 867.
Tate vs. Mo. Pac. Ry. Co., 157 Ill. App. 105.
M. C. R. Co. vs. Curtis, 80 Ill. 324.
G. So. R. Co. vs. Barfield, 1 Ga. App. 203.
Ferguson vs. Southern Ry. Co., 74 S. E. 129 (S. C.)
St. L. & S. F. Ry. Co. vs. Dreyfus, 141 Pac. 773 (Okla.).
B. & O. R. Co. vs. Keedy, et. al., 75 Md. 320.
Fentiman vs. A. T. & S. F. R. Co., 98 S. W. 939 (Tex.).
Wabash R. Co. vs. Sharper, 76 Neb. 424.

The burden of proof is upon the carrier to show it is free from fault where the proximate cause of the loss was an Act of God. Where an Act of God causes injury to property in the hands of common carrier, and such act is the sole cause of such injury then the proof of such fact is a perfect shield. In some state courts it has been held that if there be any negligence on the part of the carrier, which had it not been present, the injury would not have happened notwithstanding the Act of God the carrier cannot escape responsibility. And the onus is upon the carrier to show, not only that the act of God was the cause, but that it was the entire cause, because it is only when the act of God is the entire cause that the carrier can be shielded.

Slater v. So. Carolina Ry Co., 29 S. C. 96, 6 S. E. 936.
National Rice Milling Co. v. New Orleans & C. R. Co., 132 La. 615, 34 Ann. Cases 1099.
Joliffe v. Northern Pacific R. Co., 100 Pac. 977.
Hayes v. Kennedy, 41 Pa. 378.
Graham v. Davis, 4 Ohio State 362.
Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802.
Montgomery & W. P. R. Co. v. Moore, 51 Ala. 394.
McCarthy vs. L. & N. R. Co., 102 Ala. 193.
Central R. Co. vs. Mitchell, 91 N. E. 735 (Ind.).
Read vs. Spaulding, 30 N. Y. 630.
Dunoon v. N. Y. C. R. Co., 3 Lans. 265.
Fentiman v. A. T. & S. Fe. R. Co., 44 Tex. Civ. App. 455.
Perkins v. C. C. C. & St. L. Ry. Co., 183 Ill. App. 531.
Railroad Co. v. Summerour, 139 Ga. 545.
Prelly Co. v. R. Co., 120 Minn.
Lyon v. R. Co., 165 N. C. 143, 295.
Union Express Co. v. Graham, 26 Ohio St. 595.
Adams Express Co. v. Stellaners, 61 Ill. 184.
Fentiman v. A. T. & S. F. R. Co., 98 S. W. 939 (Tex.).

44. Watson v. Union Pac. R. Co. (Mo. 1915), 178 S. W. 871, 872.

The general rule is that the freezing of goods of perishable nature

a carrier to apprehend that at certain seasons of the year shipments of perishable produce are liable to freeze.[45] But where a shipment of perishable produce is made in a month when freez-

while en route is an act of God for which the carrier is not liable unless caused by unnecessary delay in transportation or by careless exposure to the cold.

Vail v. Pacific R. Co., 63 Mo. 230.

Wolf v. American Express Co., 43 Mo. 422, 97 Am. Dec. 406.

Swetland v. Boston, etc., R. Co., 702 Mass. 276.

Wing v. New York, etc., R. Co., 1 Hilt. (N. Y.), 235.

The carrier is liable where goods are frozen owing to its negligence either in shipping at a season of the year when a freezing spell might reasonably be anticipated or in not properly taking care of the shipment during freezing weather.

Hewett v. Chicago, etc., R. Co., 63 Iowa 611.

Fox v. Boston, etc., R. Co., 148 Mass., 220, 19 N. E. 222.

McGraw v. Baltimore, etc., R. Co., 18 W. V. 361, 41 Am. Rep. 696.

Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

Milton v. Denver, etc., R. Co., 1 Colo. App. 307, 29 Pac. 22.

Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874.

Hinton v. Eastern R. Co., 72 Minn. 339, 75 N. W. 373.

However, it has been held that a carrier was not liable where fruit, for example, was delivered to it for shipment when the temperature was below freezing point on forwarding the fruit on date of receipt instead of retaining in storage until warmer weather.

Tucker v. Pennsylvania R. Co., 11 Misc. Rep. (N. Y.), 366, 32 N. Y. Supp. 1.

Tierney v. New York Cent., etc., R. Co., 76 N. Y. 305.

But a carrier is not responsible for a loss or injury incurring from any inherent, natural infirmity or tendency to damage or depreciation or delay of the goods in the course of transportation or caused by some act of the shipper.

B. F. Schwartz & Co. v. Erie R. Co., 32 Ky. Law Rep. 777, 106 S. W. 1188.

Carpenter v. Baltimore & O. R. Co., 6 Pen. (Del.) 15, 64 Atl. 252.

McGraw v. Baltimore & O. R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

Abiline & S. Ry. v. Ward (Texas 1915), 178 S. W. 638.

Of course, the carrier must furnish suitable means of transportation and must use proper care to transport the commodity safely to destination. This obligation means that the commodity must be properly safeguarded from weather conditions during transit. In case the kind of appliance ordered by the shipper is furnished because it is assumed by him that such a car will carry the commodity safely through to destination, the fact that it does not is not the negligence of the carrier but the misfortune of the shipper. The carrier has done everything necessary for it to do and cannot be charged with negligence.

45. Young v. Maine Cent. R. Co. (Me. 1915), 93 Atl. 49, 50. Also see

ing weather is not unusual and the shippers direct the carrier to leave open a vent in the car, they can not recover for loss caused by severe but not unprecedented cold weather.[46] So a shipper of apples is bound by the act of his agent, whom he employs to haul the apples from his orchard to the railroad, in ordering the carrier to keep the vents open to destination, by reason of which the apples are frozen owing to a blizzard coming up while in transit.[47] However, the carrier must not contribute to the injury by any negligent act of its own. A carrier is liable for injuries to potatoes caused by freezing in spite of the fact that the bill of lading contains a notation that the shipper assumes the risk of freezing, where the shipment was delayed four days in transit, as the carrier cannot exempt itself from liability through negligence. A carrier cannot excuse delay, in transporting freight on account of shortage of cars and unprecedented amount of business, where it accepts a shipment without notice of such facts to the shipper.[48] And a carrier of potatoes, which was in charge of the loading and transportation, is liable for injuries from freezing,[49] especially where the evidence showed there was no straw in the car or any other precaution to anticipate changes in temperature.[50] A carrier of bananas under contract whereby a messenger traveled with the shipment to advise regarding its protection against cold, which carrier twice disregarded the messenger's request en route to roundhouse the bananas, could not escape liability on the ground that the messenger did not ask that the fruit be protected at destination after they had been exposed to low temperatures and were frozen.[51] While the rule is well estab-

Nelson & Co. v. C. & N. W. Ry. (Neb. 1918), 167 N. W. 574.

46. Abilene & S. Ry. Co. v. Ward (Texas 1915), 178 S. W. 638, 641.

47. Abilene & S. Ry. v. Ward (Texas 1915), 178 S. W. 638, 340.

48. Daoust v. Chicago, R. I. & P. R. Co., 149 Iowa 650, 128 N. W. 1106, 34 R. L. A. (N. S.) 637; Unionville Produce Co. v. Chicago B. & Q. Co., 168 Mo. App. 168, 153 S. W. 63; Missouri K. & T. Ry. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Young v. Main Cent. R. Co. (Mo. 1915), 93 Atl. 48, 49.

49. St. Louis, I. M. & S. R. Co. v. Hughes Produce Co. (Ark. 1915), 177 S. W. 400. Also see Bevens Bros. v. A. C. L. R. R. (N. C. 1918), 97 S. E. 215.

50. St. Louis, I. M. & S. R. Co. (Ark. 1915), 177 S. W. 400, 401.

51. Illinois Cent. R. Co. v. Freeman (Tex. 1916), 182 S. W. 369.

lished that in the event of an unreasonable delay in the carriage of goods the carrier will be held liable for all losses or damages consequent thereon, yet the mere fact that a delay has occurred is not sufficient to charge a carrier, unless it appears that such negligent act was in truth the proximate and not merely the remote cause of loss. It may be held, taking into account the nature of the property, its liability to be injured by freezing weather, the distance from the point of shipment to the place of destination, the favorable condition of the weather when the property was delivered to the carrier, and its liability to change at that season of the year, that the carrier was liable to damage to the property because the delay was the immediate and proximate cause of that damage.[52] So it may be stated that while a shipper of live stock, in tendering cattle for shipment is aware of weather conditions and assumes the risk of such conditions, yet the railroad has possession of the shipment as a common carrier and is required to exercise a degree of care that a reasonable, cautious and prudent man would, under like circumstances.[53] In a typical case of live stock injured by freezing it was held that in transporting a car of cattle, and shunting it on a side track the carrier was bound to exercise reasonable care in so placing it as not to unnecessarily expose the cattle to the inclemency of the weather, and, if it did place the car where it was unnecessarily exposed, it was a fair question for the jury whether the carrier exercised reasonable care to protect the stock while there, or, if the exercise of such care so required, to remove the cattle from the car if reasonably essential for their protection. The company was not required, as a matter of law, to maintain a switch engine at its junction, but it was required to do all in the care of stock delivered to it for carriage reasonable and necessary for its proper care and protection, and whether it was bound to place the car in a position where it might be unloaded or remove it from its exposed condition in which it had placed it depended entirely upon the ordinary care which was exacted from it. Of course there might be circumstances under which

52. Young v. Me. Central R. R. (Me. 1915), 93 Atl. 48, 50.

53. Golsch v. Chicago, M. & St. P. Ry. Co. (Iowa 1915), 153 N. W. 327, 330.

cattle might freeze without fault on the part of the carrier, but in this case it was a fair question for the jury whether the carrier exercised ordinary care in the protection of the cattle during transportation, and, if it failed so to do, whether the cattle were injured and lost in consequence of such omission.[54] Generally

54. Golsch v. Chicago, M. & St. P. Ry. (Iowa 1915), 153 N. W. 327, 330, 331.

It is the duty of the carrier to take precautions to prevent freight from freezing, but the shipper, either through a released rate, or other action, may relieve a carrier from such liability. Where a shipper, not wishing to wait for a refrigerator car, accepted a box car in which to ship potatoes, expressly assuming by indorsement on shipping order the risk of freezing, he could not recover damages for freezing in action for breach of contract of carriage, there being no evidence that damage was caused by delay, notwithstanding a state statute permitting a carrier to insert in the bill of lading only such conditions as do not impair his obligation to exercise the "degree of care in the transportation and safe keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." Lardie & Son v. M. & N. E. R. R. (Mich. 1916), 158 N. W. 31.

And damages for freezing of onions in transit alleged to be due to delay will not be awarded where, though forty-eight hours should have sufficed for the journey, ninety-six hours were consumed, during all of which the temperature was above 32 degrees, F., except for a time on one day when a minimum of 24 degrees, F., was reached. William R. Mankoff, Inc., v. Erie R. Co., 161 N. Y. S. 345.

So far as damage by freezing is concerned, it is the duty of the carrier to take proper care of the goods during transportation and in case of a fall in the temperature it should preserve the shipment from harm by taking the necessary precautions.

In Hutchinson on Carriers, third edition, section 501, the rule is laid down as follows:

"A common carrier is not only bound to provide vehicles at the commencement of the journey reasonably fit and sufficient for the conveyance of the goods which he undertakes to carry, but he must from time to time, as the good management of his road would seem to require it, inspect such vehicles while they are in transit. And the same duty of inspection in respect of vehicles received from a connecting carrier, and run on his own line, devolves upon him as in respect of those provided by himself; and if he fails to make such reasonable inspection he will be deemed guilty of such negligence as will render him liable for any resulting loss, although his contract would otherwise excuse him.

"Section 502. Carrier, in the selection of vehicles, must guard against the exigencies of such weather as may reasonably be expected. In the selection of vehicles for the transportation of the

goods, it is the duty of the carrier to guard against the exigencies of such weather as may reasonably be expected at the particular season of the year and latitude in question. Very cold weather in a latitude where such weather is at times experienced, and at a time of the year when such weather is likely to be experienced, cannot be termed a 'stress of weather' within the meaning of an exemption in the bill of lading from liability for loss."

Moore on Carriers, second edition, p. 315, states the rule as follows:

"The freezing of goods of a perishable nature while en route is an act of God, for which the carrier is not liable, unless caused by unnecessary delay in transporting them, or their careless exposure to the cold. To render a common carrier liable for the destruction of goods by freezing while in transit under a bill of lading exempting it from damages for freezing, it must not only be guilty of unreasonably delaying transportation, but the goods must have been frozen during the delay and because of it. The carrier is liable where the goods are frozen owing to its negligence in shipping promptly at a season of the year a freezing spell might reasonably be anticipated; but it is not liable, where fruit, for example, was delivered to it for shipment when the temperature was below freezing point, for negligence in forwarding the fruit on the day of receipt, instead of retaining it in storage until warmer weather. A carrier is liable for loss by freezing where the goods are detained for excessive charges. A carrier which receives cars which it knows, or should know, contain perishable goods, and, on account of the impassable condition of its own road, which runs through a warm section, without notifying the shipper, ships them in the dead of winter by a northern route, during transit on which the goods are frozen and destroyed, is liable in damages for the value of the goods. A common carrier is not, as a matter of law, free from negligence for the loss by freezing of fruit carried over its road, although it does what is usual and customary for other carriers to do under similar circumstances."

Michie on Carriers, p. 784, says:

"A carrier undertaking to transport perishable goods is bound to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract. If it undertakes to carry perishable property in vehicles specially adapted to preserve that kind of property, it becomes responsible for defects in such vehicles, if damage results. The carrier is not relieved of responsibility to the consignee therefor by the fact that it had the car inspected by the shipper from whom the goods were brought."

Where a shipper directs a carrier to carry goods under ventilation in a certain way and the carrier follows the instructions it is not liable for injury resulting from the ventilation, but otherwise, when the carrier violates the instructions of the shipper and injury occurs thereby. Michie on Carriers, p. 785.

A carrier of perishable goods must exercise care, in view of the fact that the goods are perishable and though it is not liable for losses

caused by the inherent nature of the goods, it is liable for damages due to acts which may be negligent in view of the nature of the goods, and which might not be negligent concerning other goods.

Trakas v. Charleston, etc., R. R., 87 So. Car. 206.

Peet v. Railway, 20 Wis. 594.

St. Louis, etc., R. R. Co. v. Renfroe, 82 Ark. 143.

Western R. R. v. Hart, 160 Ala. 599.

Chicago, etc., Ry. v. Davis, 54 Ill. App. 130, 159 Ill. 53.

That perishable goods require special attention on the part of the carrier, is illustrated by the following principles laid down in Hutchinson on Carriers (3d ed.), Sec. 649:

"As between different shippers, the carrier, as we have seen, cannot give preferences or show favors in the order in which the goods accepted by him shall be carried. But it has been held that, if he has accepted more freight than he can immediately forward with the means of transportation at his command, and that therefore a portion of it must be delayed, and that it consists of two kinds, one perishable and the other not, he should give the preference to that which is perishable. Such goods are said to require more care and attention than those which are not perishable, and if either must be delayed, it should be those of the latter description. The carrier has therefore been held excusable for making the discrimination, and not liable for the consequent damages, when the safety of the goods of a perishable nature required it."

While it is the duty of a carrier to use such means as will prevent a shipment from freezing, but it is only required to use such means as under its tariffs it agrees to use, or which its common law duty (if not modified either by contract or law) casts upon it. If its filed tariffs provide it will not heat cars during the cold weather unless shippers furnish the necessary facilities, it will not be held liable for its failure to do so. On the other hand, if it appears that during cold weather it will "round-house" cars to prevent them being frozen, and it fails to do so, its omission constitutes negligence, especially where it appears that this process, which consists of running the car into a round house raises the temperature of the car so that it will go through an ordinary freeze without danger. A car load of eggs were shipped at the time when the temperature was below the freezing point and which sank still lower during the transportation. Under the filed regulations the carrier was not required to place heat in the car unless the shipper furnished the necessary means, fuel, and the men to care for them. The bill of lading contained no instructions of any kind. It appeared that during severe weather such shipments were run into round houses for the purposes of warming up the car. The initial carrier on the waybill noted "no heat by order of shipper." Held, such facts together with the one that the eggs arrived frozen raised a presumption of negligence on the part of the carrier. Victor Produce Co. v. Chicago & N. W. Ry. Co. (Minn. 1916), 160 N. W. 201.

A claimant brought suit for the value of a carload of temperance beverages which had been frozen in

speaking, a carrier is liable for loss or injury due to freezing.[54½]

10. Refrigeration by Carrier. Very frequently shipments must move under refrigeration. The law imposes upon carriers the duty of furnishing cars properly iced. In addition to this requirement there may be a contractual obligation as well to furnish an iced car at a certain time and place.[55] When the carrier, however, furnishes the car, the shipper must use due diligence in loading, particularly if the car is sent to a small town where there are no icing facilities. A typical case follows: A shipper of peaches who should ordinarily have loaded a car in 10 hours took 34 hours to do it, by which time the ice which had filled the bunkers melted so that it would no longer protect the shipment. The carrier receipted for the peaches as in apparent good condition. As soon as the car was loaded, it was taken to a re-icing station and at once re-iced. Held, that when the carrier sent the

transit. It appeared that the goods had been received by the carrier in barrels covered with manure, and that he unloadede the shipments and drayed them about 150 feet to a refrigerator car, in which they were placed, and in which they were frozen in transit. The court held that if the shipment was damaged while being transferred by the claimant from one car to another, the carrier would not be responsible, and that it was not responsible for any depreciation in transit due to the inherent nature of the shipment. Michellod v. Ore.-Wash. R. & N. Co. (Ore. 1917), 168 Pac. 620.

54½. A showing that vegetables have frozen in a car, which has been tendered for delivery by a carrier, is prima facie evidence of negligence on the part of the carrier. Lynch v. Union Pac. R. R. (Colo. 1918), 172 Pac. 1061, 1062; Nutt v. Davison, 54 Colo. 583, 131 Pac. 390.

But the fact that a shipment freezes in a car, which is tendered for delivery, is not conclusive evidence of negligence on the part of the carrier, especially when it is shown that the claimant had access to the car and was daily removing from it a portion of the shipment and that this continued for a period of seven days. Lynch v. Union Pac. R. R. (Colo. 1918), 172 Pac. 1061, 1062; Nutt v. Davison, 54 Colo. 586, 13 Pac. 390.

Where a railway delivers a carload of vegetables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vegetables ceases; and, where vegetables remaining in the car freeze, the railway is not liable for damages sustained. Lynch v. Union Pac. R. Co. (Colo. 1918), 172 Pac. 1061.

55. St. Louis, I. M. & S. Ry. Co. v. Tilby (Ark. 1915), 174 S. W. 1167, 1169. See Brown v. So. Ry. (S. C. 1918), 96 S. E. 298.

railroad car fully iced to a small place where there was no icing station, it had fulfilled the duties incumbent upon it and, if the shipper unnecessarily delayed the car until the ice had melted below the safety point, the carrier could not be held liable for the results. [56] However, it is incumbent on the shipper when he finds that the railroad has not complied with its contract to furnish an iced car to do all that he can to mitigate his damages, and, notwithstanding the fact that the car was not properly iced, the jury has a right to find that he pursued the proper course in loading his peaches, and in making all possible effort to get them to a market and dispose of them to the best advantage. [57] Once the cars are in the possession of the carrier, it is necessary for it to follow the route given by the shipper for icing and in case it deviates from the route it is liable for any damage whatever, no matter if caused by the act of the shipper or other agencies for which ordinarily the carrier would be relieved from liability. Thus a shipper of plums and peaches from Appleton, N. Y., to New York City, noted on the bill of lading to re-ice at Kendall and Karner. The carrier deviated its cars to its west shore division and re-iced at Frankfort instead of Karner. The provisions in a contract of affreightment for the re-icing of perishable fruit, and naming the points at which such re-icing is to take place, are very substantial and important provisions of such contract.

11. **Rough Handling.** It must be remembered a carrier of livestock is only required to use ordinary care in their transportation. [58] But even though a train may move at a proper speed and make the trip on schedule time, this will in no manner relieve the company from the consequences of any negligence in the manner of caring for stock being transported during any necessary delay at stations or when moving on the road. [59] Where it appears that livestock is delivered in a sound and uninjured condition to the initial carrier and the stock is delivered to consignee at destina-

56. St. L. & S. W. Ry. v. Grant (Tex. 1915), 174, S. W. 714.

57. St. Louis, I. M. & S. Ry. Co. v. Tilby (Ark. 1915), 174 S. W. 1167, 1169.

58. Houston & T. C. R. Co. v. Lindsey (Tex. 1915), 175 S. W. 708, 711.

59. Golsch v. Chicago, M. & St. P. Ry. Co. (Iowa, 1915), 153 N. W. 327, 329.

tion in an injured condition, a prima facie case is made against the carrier and the burden rests upon it to show that such injured condition resulted from the inherent nature or natural propensities of the animals.[60] The liability of a carrier of goods does not cease until the goods are unloaded from the car and delivered to the consignee, or placed in a storehouse provided for that purpose, and, where the character of the shipment is such that it would be impracticable to place it in the carrier's storehouse, the carrier's liability as such, and in the absence of contract providing otherwise, continues until the car is at destination, where such cars are usually loaded, or at some convenient place at the request of the consignee.[61] Of course, under the federal act known as the Twenty-eight Hour Law, (printed in the appendix), the carrier is bound to unload cattle and feed, water and rest them for five hours.[62] The carrier must furnish proper facilities with which to transport livestock. It being a matter of com-

60. Gulf, C. & S. F. Ry. Co. v. King (Texas 1915), 174 S. W. 960, 962.

Evidence that a carrier's stock pen at a division point was muddy, that a shipper's cattle were compelled to drink muddy water, and had difficulty in getting sufficient water, and could be fed only by throwing the hay upon ground, without any showing of injury to the cattle, is insufficient to sustain an action against the carrier. Patterson v. Chicago & A. Ry. Co. (Mo. 1916), 182 S. W. 1034, 1035.

In an action for damages to a shipment of cattle, where it appeared that during transportation some of the cows calved prematurely, evidence as to whether rough handling and jolting during the transit would cause such calving, in view of evidence upon which the jury might find rough handling and jolting. was admissible to prove a cause of the calving. Greening v. Chicago & N. W. Ry. Co. (Mo. 1916), 183 S. W. 1121.

61. Chicago, R. I. & P. Ry. Co. v. Stouffer (Ind. 1916), 111 N. E. 809.

62. Act June 29, 1906, c. 3594, §1, 34 Stat. 607 (Comp. St. 1913, §8651), provides that no railroad, whose road forms any part of a line of road over which animals shall be conveyed from one state or territory into or through another state or territory, shall confine them for longer than 28 consecutive hours without unloading them for rest, water and feeding. A shipment of horses from a point in Ontario, Canada, to a point in British Columbia, passing through Michigan and Illinois en route, was confined in excess of 28 hours while being transported from a point in Michigan into and through the state of Illinois to a point therein where the animals were unloaded. Held,

mon knowledge that the natural propensity of a mule is to kick, it is the duty of a carrier transporting such animals to take into consideration and furnish cars constructed with due regard for this propensity. And in an action against the carrier for injury

that this constituted a violation of the statute, the point of origin of the shipment and its final destination not being material. Grand Trunk Ry. Co. v. United States, 229 Fed. 116. See U. S. v. Phila. & R. Ry., 247 Fed. 469.

Where, in an action for damages to an interstate shipment of cattle from delay in transportation, it appeared that the cattle were given the rest required by the federal 28-hour law, and that claimant's right to recover was based on the carrier's failure to give additional time for rest, the carrier's liability depended on the terms of the shipping contract and duties arising therefrom by operation of law; and hence the carrier's failure to give the additional time anticipated by the shipper did not render it liable in the absence of a contract stipulation relative to such additional time. Kent v. Chicago, B. & Q. R. Co. (Mo. 1915), 176 S. W. 1105.

In an action by shippers of livestock for delay in transit, where the shipment was interstate and required at least 60 hours to make, the jury should have been instructed with reference to the requirements of the federal law as to the unloading of cattle for resting, watering and feeding. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916), 183 S. W. 384.

In an action by shippers of livestock for delay in transit, where the claimants read in evidence part of the contract of shipment, the clause that the livestock were not to be transported within any specified time, etc., not contrary to the federal statute touching the watering, etc., of livestock in transit, and not an attempt to contract against the carrier's negligence, was admissible as showing the entire contract. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916), 183 S. W. 384.

The federal acts, declaring that, save under specified circumstances, a shipment of livestock shall not be confined to the cars for more than 28 consecutive hours, did not abrogate the duty of the common carrier to feed, water and rest the animals as reasonable necessity might require, but merely provided a maximum beyond which stock could not be confined; therefore a carrier cannot justify its act, in confining stock without food and water for an unreasonable period of time, on the ground that it was within the maximum prescribed by statute. Texas & P. Ry. Co. v. McMillen (Tex. 1916), 183 S. W. 773.

Where an interstate carrier filed tariffs for the transportation of animals provided for feeding in transit and prescribed particular prices for feed when animals were held for a greater or less time than 15 days, there being no limitation on the time, a carrier's contract to feed animals in transit without reference to time

to a mule in transportation, where the animal caught its foot in a crack four or five feet above the floor of a car, it was held that this evidence was sufficient to warrant the deduction of an improper construction of the car.[62]

would be valid if the same privilege was allowed to all shippers. Klink v. Chicago, R. I. & P. Ry. Co., 219 Fed. 457, 458.

63. Ft Worth & R. G. Ry. Co. v. Albin (Tex. 1916), 185 S. W. 647.

The carrier, of course, is bound to take proper care of livestock while it is in its custody. If it does not and the cattle become injured, the shipper is entitled to reasonable time in which to prepare the cattle for market so as to get the best possible price. Thus, where cattle have been injured by a wreck and consequent delay during transportation by carrier, the owner was not required to accept an unfavorable opportunity to sell, but was entitled to a reasonable time to prepare them and an opportunity to sell them in the open market. Gulf C. & S. F. Ry. v. Rodriquez (Tex. 1916), 185 S. W. 311.

In an action against a carrier for damages to cattle by wreck and consequent delay in transportation, where plaintiff sought to recover for only 300 out of 422 bales of hay purchased to feed the cattle from Saturday until Monday, it will be assumed that the jury in estimating the damages took into account the fact that it was customary for shippers, immediately upon the arrival of cattle for sale, to feed and water them at their own expense, at least once. Gulf C. & S. F. Ry. Co. v. Rodriquez (Tex. 1916), 185 S. W. 311.

The carrier is, of course, bound to use reasonable care in the transportation of live stock, but simply because an animal should die a short time after it arrives at destination does not show the carrier to be negligent. So the fact that a foundered mare, lame in her front feet when shipped, dies about a month after delivery, does not show that the carrier was guilty of rough handling in transporting her. Jones v. Galveston, H. & S. A. Ry. Co. (Tex. 1917), 193 S. W. 373.

In an action for damages to a shipment of cattle, a requested charge that, if the cattle were damaged when unloaded as a result of failure to transport them with reasonable care and dispatch, but the damages were temporary and such as should have been overcome within a reasonable time by the exercise of reasonable care on the shipper's part, the jury in estimating the damages should consider their temporary nature and the degree to which the cattle would have recovered with proper care and handling by the shipper should be refused. P. & S. W. Ry. Co. v. Vaughn (Tex. 1917), 191 S. W. 142.

There seems to be some diversity of opinion in the state courts as to the burden of proof where livestock is injured in transit. Some states seem to hold that in an action for injury to a shipment of stock, where uncontradicted evidence shows part of the carriage, it is error to that there was no negligence during

12. **Shipments in Open Cars.** For a long time a controversy has been raging between shippers and carriers as to the liability of the latter for loss or damage to property while carried in open cars. It has been the custom to transport a number of low grade commodities, such as coal, sand and lumber products, in

submit that question to the jury. P. & S. F. Ry. Co. v. Harp (Tex. 1917), 193 S. W. 438.

In other states it seems to be the rule that when the stock is injured while in custody of the carrier the burden then rests upon it, to prove to the satisfaction of the jury, that the injury is not the result of its negligence. In Teeter v. So. Express Co. (N. C. 1916), 90 S. E. 761, the court said: "As to the negligence alleged, the stock was injured while in the custody of the express company, and the burden of proof is upon such defendant to exculpate itself. It is true that a carrier is not liable for damages caused by an animal's natural viciousnes or by the viciousness of other animals (6 Cyc. p. 382); but, as the injuries occurred while the stock was in the care of the carrier, it must establish to the satisfaction of the jury that the injury is not the result of its own negligence. In a shipment of livestock the carrier is to some extent an insurer, and the burden is upon it to show that injuries in transportation were not caused by its negligence." Railway Co. v. Slattery, 76 Neb. 721, 197 N. W. 1045, 124 Am. St. Rep. 825. Also, see Schloss Davis Co. v. Railway (N. C.), 88 S. E. 477.

In this connection it must be remembered that the Twenty-eight-Hour Law makes it a criminal offense for a carrier not to observe its *provisions.*

Under that law, prohibiting carriers of animals confining them for more than 36 hours without unloading for rest, water and feeding, unless prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by exercise of due diligence and foresight, and declaring a penalty for a carrier who "knowingly and willfully" fails to comply with such provision, while every confinement for more than such period is prohibited unless it appears with reasonable certainty to come within the exceptions, the penalty is not imposed unless it clearly appears the carrier acted with knowledge that the thing prohibited was being done, but if it had this knowledge, it was acting willfully. United States v. Philadelphia & R. Ry. Co., 238 Fed. 428.

However, it is clearly apparent that the claimant must always show the condition of the shipment when delivered to the carrier, as there is no presumption that a shipment is in good condition when delivered for transportation. In the absence of proof of the condition a wagon top was in when shipped, the fact that two days during the transportation the weather was rainy, without evidence that the water had penetrated the canvas covering with six coats of paint and into the hard pine ceiling of the top, does not show that the carrier was liable, on the theory

such cars, with the result that in many cases a substantial shortage would develop, due to pilferage or shrinkage. The carriers contended that these cars were furnished largely for the convenience of the shippers, and therefore they should not be held to the same degree of liability in case of loss. The shippers contended that it was the duty of the carriers to furnish proper equipment, and if they chose to furnish open cars they should take the consequences. Probably, from the legal point of view, this latter contention seems the more reasonable. Another phase of the situation arose during times of car shortage, particularly with respect to automobiles; the shippers at Detroit, in order to move their

of the top having been exposed to rain in transit, but leads to the conclusion that the top of the wagon buckled because of the wood used in its manufacture. Parsons Wagon Co. v. Long Island R. Co., 162 N. Y. S. 367.

For any injury which a shipment suffers as a result of rough handling in transit the carrier is responsible. So where the carrier undertook to bed stock it was liable for failure to exercise ordinary care to perform such duty. T. & P. Ry. v. Thorp (Tex. 1917), 198 S. W. 335.

Where it appears that cotton raised in 1914 had been under shelter only part of the period from the summer of 1914 until August, 1915, and the carrier in transporting the same showed it was not guilty of negligence, but the cotton arrived in a damaged condition, there is no evidence to support a verdict that the damage to the cotton was occasioned through any fault of the carrier. Galveston, H. & S. A. Ry. Co. v. John Muennink & Son (Tex. 1917), 195 S. W. 613.

In an action against a railroad for damages to a shipment of turkeys, the charge that, if the jury believed from the evidence that the consignment was roughly handled by the road and delayed, and that the delay and rough handling were the direct and proximate cause for the damage, they should find for plaintiff, was erroneous as assuming that rough handling was negligence as a matter of law. Panhandle & S. F. Ry. Co. v. Wrighterndon Co. (Tex. 1917), 195 S. W. 216.

It seems to be held in some jurisdictions that the mere proof of injury to a shipment of livestock while in transit does not make out a *prima facie* case of negligent operation against the carrier. Robinson v. Bush (Ore. 1914), 200 S. W. 757.

A rule of this kind, however, is against the weight of authority. Where a carrier undertook to precool refrigerator cars and to ice them during transit and the shipment was injured by failure to properly precool and ice the cars, the carrier has the burden of proving that it exercised due care notwithstanding it had no precooling plant at the place of shipment. Wells-Fargo & Co. v. Sprague (Tex. 1917), 199 S. W. 657.

products, were forced to accept open cars and cover the machines with heavy canvas. The carriers attempted, by provisions in the bill of lading, to limit their liability as an insurer in case of all shipments in open cars. It is very probable that any such stipulation as this is invalid under the Cummins Amendment, and this seemed to be the view of the Interstate Commerce Commission in its recent investigation in prescribing a new form of bill of lading, where it said (52 I. C. C. 706): "Section 1, Clause 5, Transportation in Open Cars.—In Section 1 of the present uniform and standard forms of bills of lading it is provided that—'When, in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be upon the carrier or party in possession.' The carriers desire to retain this provision in the proposed uniform bill, but the shippers object and offer the following as a substitute: 'Property not customarily transported in open cars, when transported in open cars at the request of the shipper, shall be at the owner's risk as to loss or damage resulting from the use of such open car, provided such loss or damage could not have been prevented by reasonable care by the carrier or party in possession; provided further, however, that in the case of loss thereof or damage thereto by fire the liability of the carrier or party in possession shall be the same as if the property had been carried in a closed car, and the burden to prove that the carrier exercised reasonable care shall be upon the carrier.' It is the custom to transport in open cars certain low-grade commodities and heavy or bulky articles, such as ore, coal, sand, stone, logs, lumber, machinery, engines, agricultural implements, including separators, traction engines, lumber products, poles, street cars, structural and other classes of steel, etc. Detachable parts are frequently included with machinery, engines, etc. More recently, because of the general shortage of equipment, automobiles have been extensively carried in open cars. The reasons advanced by the carriers in support of the retention of this provision are: (1) that the use of open cars is largely for the con-

venience of the shipper or consignee; (2) that they are often used to reduce the cost of handling the freight (the shipper usually loading and the consignee usually unloading carload shipments), as well as for the shipment of articles too large or bulky to be loaded into box cars; (3) that there is an additional hazard, and that the carriers have great difficulty in policing the transportation in open cars of property that offers opportunities for pilferage, or is likely to be damaged by weather, or which is peculiarly susceptible to loss or damage to detachable parts that the shipper could remove and thus protect himself, but which he will not ordinarily remove if the carrier can be held liable for the damage. It is contended on the part of the carriers that the provision in dispute has been long in effect; that it is not affected by recent legislative enactments, and that there has been no evidence offered to show that the rule has worked any embarrassment or injustice, and that there is no reason to believe that in the future, any more than in the past, any shipping interest will suffer by the retention of the open-car provision in the bill of lading. The shippers object to the language of the provision as it reads at present because they say: (1) that the practical effect is to restrict the carrier's liability for all goods carried in open cars to loss or damage by negligence only; (2) that property that is customarily transported in open cars is of such a nature as to be largely free from loss or damage, but when such loss or damage does occur it would ordinarily not be due to the use of open cars, and that the carrier should be subject to the same liability with respect thereto as it assumes with respect to property transported in closed cars; that to put the risk of loss or damage, not directly attributable to open cars, on the shippers would be to impose an unjust burden; (3) that it is the duty of the carrier to transport property that is not ordinarily transported in open cars and that it should be required to assume the liability; (4) that there is no reason for excusing the carrier from liability for loss or damage to goods transported in open cars when such loss or damage is not caused by the fact that an open car was used; that in any event, if property in open cars is to be shipped under a restricted liability, there should be a direct relation between the use of the open car and the loss or damage from which the carrier is to be exempted. The shippers are willing to assent

to a limitation of the carrier's liability when property not customarily transported in open cars is, at their request, so transported and loss or damage occurs as the direct result of the use of open cars. It is obvious, however, that a limitation so phrased might ultimately become inoperative because goods which are not now customarily transported in open cars might in the course of time, and as the result of changed conditions, come to be customarily so transported. With respect to the evidential facts and conditions, it is to be observed that certain kinds of goods may, and of necessity must, be transported in open cars. Carriers commonly hold themselves out to transport such goods, and they must therefore receive and transport them when offered for shipment. In the absence of statutory prohibition, it seems, the carrier may stipulate for a limitation of its liability in receipt of goods so transported except, of course, that it can make no stipulation for exemption on account of loss or damage caused by its own negligence, 2 Hutch. Carr. (3rd Ed.) § 506, and under the law, when a consignor of goods agrees that they may be loaded and transported in open cars, the carrier, in the absence of negligence on its part, is not liable for any damage caused to the goods by their being so loaded and transported. Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga., 522. But the carrier must exercise ordinary care and diligence even when the shipper agrees to or requests the transportation in open cars. C., St. L. & N. O. R. Co. v. Moss, 60 Miss., 1003; Michie, Carriers, § 1020. We are of the opinion that the exemption stipulated for in the present and proposed bill is too broad and too greatly favors the carrier to be entirely just and reasonable. Moreover, we think that it falls within the provisions of the Cummins amendment so far as it seeks to exempt the carrier from the liabilities with which it would be charged under the common law. To that extent it would be invalid and void. To the extent that the carrier would escape liability at common law, stipulation is unnecessary. We shall therefore not approve either the rule proposed by the carriers or the substitute offered by the shippers for inclusion among the conditions."

—**Shipments Stopped in Transit.** Considerable discussion

has always existed as to the liability of the carrier under provisions in the bill of lading for injuries to property which occurred while the property was held short of destination. In the new bill of lading carriers have sought to limit liability to that of negligence only in cases where property is damaged while held at a transit point at the request of the shipper, or while damaged as the result of riots or strikes. The Interstate Commerce Commission in discussing this question in the Bill of Lading Investigation, came to the conclusion that such a limitation of liability was valid, saying (52 I. C. C., p. 702): "Section 1. Clause 4, Liability of Carrier for Property While Stopped and Held in Transit.—The present uniform bill provides that: 'Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or from riots or strikes, or for country damage to cotton.' The standard bill contains a similar provision but without the parenthetical clause relative to the burden of proof. The carriers desire to retain this provision in the proposed bill, but it is objected to by some of the shippers. The grounds upon which the carriers contend for this provision are: (1) That transit is a privilege carried in many tariff publications and that generally no extra charge is made for such service; (2) that it is granted upon condition that the carrier shall be relieved from liability as an insurer while the property is so held at the request of the owner; (3) that the property during that time is not within the full control of the carrier, but is held at a designated point under instructions from the shipper; (4) that the service is analogous to that of a warehouseman and the liability should be that of a warehouseman; (5) that the Commission is not empowered to extend the carriers' liability; (6) that shipments are held in transit frequently for a considerable length of time in cars and warehouses of the carriers; (7) that for so valuable a privilege held out by the bill of lading the carriers would be entitled to additional compensation for the liability assumed; (8) that in the absence of limitations in the

contract the carrier's liability is that of a warehouseman only. The shippers contend against the retention of this provision on the grounds: (1) That the stoppage in transit is a part of the service for which the transportation charge is made, or, as is often the case, for which an additional charge is made, and that if loss or damage occurs while the owner of the property is availing himself of a lawful provision of the tariff and the carrier is actually in possession of the property it can not absolve itself from liability; (2) that the property held in transit is still the subject of transportation and is subject to the same possibilities of loss or damage as though it were in course of actual movement or held in the yards awaiting switching movement. No substantial evidence was introduced by the parties bearing upon this issue. The carriers argue that when the shipper steps in and exercises dominion over the property while it is in transit he takes it out of the power of the carrier to complete the transportation and, accordingly, that it has been held by the courts that in such case the liability of the carrier is reduced to that of a warehouseman only. St. L., A. & T. H. R. Co. v. Montgomery, 39 Ill., 335; McVeagh v. A., T. & S. F. R. Co., 3 N. Mex., 205; Elliott on Railroads, §1543; Michie, Carriers, §1091. They contend that stoppage in transitu is of value to the shipper, not only in cases of insolvency of the consignee, but very materially so in cases of diversion to meet different and advancing markets, and in a great many other ways; that for these reasons it is very largely taken advantage of by the shipper; that since it is such a service as is asked for by the shipper and granted by the carrier, it follows; first, that it should be specified; second, that it is both proper and right that the carrier should be permitted to specify its liability in connection with such a service. In behalf of the shippers it is contended * * * that 'property held in transit is still the subject of transportation and as such is subject to the Carmack and Cummins Amendments.' It is unnecessary for the purposes of this case to inquire into the principles upon which the legal right of stoppage in transitu rests. We are more particularly concerned with its development into the various forms of transit services which in the modern development or extension of transportation services have come to be quite generally accorded

to shippers under other circumstances and upon other grounds than those upon which the purely legal right of stoppage in transitu rests. Under modern practice the owner of goods may usually direct the carrier to stop his goods in transit; he may then reconsign them to another consignee; take delivery of them at a point intermediate to the original destination; order them diverted to a different destination, or returned to the original point of shipment. Such control over their property during transportation is freely exercised by shippers in this country and, where regularly done in accordance with commercial customs and practices, is customarily provided for by carriers in their tariffs. Sometimes the service is included in the stated rate or charge for transportation, in other instances an additional charge is made. We have already discussed the question of the termination of the carrier's liability as an insurer of the goods after arrival at destination, and we have seen that such liability does not attach until property has been delivered to it for immediate transportation. When goods are merely delivered to a carrier or deposited in its warehouse and are not to be transported until further orders from the owner, the carrier's liability is that of a warehouseman or bailee only. Wilson v. International Ry. Co., 160 N. Y. S., 367; Louisville & Nashville R. R. Co. v. The U. S., 39 Ct. Cl., 405. The circumstances are somewhat different, however, when goods are held at an intermediate point because of interrupted transportation. As has been said with respect to the liability of the carrier as a warehouseman of goods while they are in transit: The owner loses sight of his goods when he delivers them to the first carrier and has no means of learning their whereabouts until he or the consignee is informed of their arrival at destination. At each successive point of transfer from one carrier to another they are liable to be placed in warehouses, or to be delayed by the accumulation of freight or other causes and exposed to loss by fire or theft. Superadded to these risks are the dangers of loss by collusion, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing of the goods under such circumstances should be held to be a mere incident to the transportation, and they should be under the protection

of the rule which makes the carrier liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route. McDonald v. The Railroad, 34 N. Y., 497; see also Lewis v. Chesapeake & O. Ry Co., 47 W. Va., 656; Southard v. Minneapolis, St. P. & S. S. M. Ry. Co., 60 Minn., 382. It is otherwise, however, when the holding is at the instance of the owner of the goods and in the exercise of a right on his part, for then the carrier is placed in a different position with respect to the goods, and the circumstances of the case may divest the carrier of the high degree of responsibility which rests upon it while the goods are in its possession and in course of transportation. Under these circumstances the carrier, it is true, still has the goods in its custody, but the transportation which has been interrupted and interfered with by the owner cannot be continued until further orders have been received from the owner. The carrier's function as a transportation agent is suspended for an indefinite, and often a long period of time. 'Thus where the goods have been delivered to the railroad company for shipment, and they were loaded upon its cars for that purpose and were about to be started, but the company was then requested by the owner to wait until he could see the party to whom he had sold them, which request was complied with; and the next day the goods, while being so detained, caught fire and were damaged, it was held that from the moment the request was made to detain the goods the liability of the company was as a warehouseman only'. 1. Hutch. Carr. (3d Ed.), §113; St. L., A. & T. H. R. R. Co. v. Montgomery, 39 Ill. 335. The same principle, it would seem, should apply when, upon orders of the owner, property is stopped and held in transit pending further orders from the owner. The holding at the owner's order is not accessory to the transportation. The precise point at which the goods may be stopped and held, that is, whether in terminal yards or warehouses of the carrier, or at an intermediate point on the line of transportation, is immaterial. From our study of the question we think that even in the absence of express stipulation the carrier's liability, under the circumstances contemplated, would be that of warehouseman, only, while the property is stopped and held in transit upon request of the ship-

, owner, or party entitled to make such request. Although matter is not brought in issue, we are not satisfied with the rier's claim of exemption, which is included in this clause, n loss, damage, or delay on account of strikes or riots. We of the opinion and find that this provision should be amended as to provide that carriers shall not be liable for "delay sed by riots or strikes," as thus modified we think that the dition proposed by the carriers would be in accord with the and just and reasonable. We conclude, therefore, that the ulation proposed by the carriers is in accord with the law l is just and reasonable. It is therefore approved."

IV.

LIABILITY AFTER ARRIVAL AT DESTINATION

1. Negligent Acts in General.
2. Property on Private Sidings.
3. Notice of Arrival to Consignee.
4. Notice to Shipper.
5. Consignee's Right to Inspect.
6. Conversion.
7. Misdelivery.
 —Adverse Claimants.
8. Order-Notify Shipments.
9. Duty of Consignee to Accept.
10. Liability for Fire at Destination.
11. Right to Sell.
12. Warehousing.
13. Disputes over Charges.
14. Concealed Loss.

1. **Negligent Acts in General.** As will be seen by the discussion under Chapter V, the liabilty of a carrier as an insurer remains fixed until the goods are delivered to the consignee, or else liability as warehouseman has attached because of failure to make delivery. As also is pointed out in Chapter VI, there are certain exceptions to this liability as insurer. Since a great many shipments are damaged after arriving at destination, it is of prime importance to determine when the carrier's liability as insurer has changed. Not only is the carrier required to transport the property safely, but he is also obliged to take care of it after it arrives. He must use proper care in unloading it. If the consignee does not receive it he must use reasonable care in taking care of it. The goods must be ready for delivery at the right place. Any notion that the carrier's liability has terminated once the goods have arrived at their destination is erroneous. The liability as insurer continues only for such

reasonable time after arrival as is necessary for the consignee to accept the goods, after which the liability as insurer is changed to that of warehouseman; but whatever the status of the carrier, that is, either as insurer or warehouseman, he must take care of the goods until they are finally disposed of. The duty of the carrier includes the obligation of a safe delivery to the consignee, and its responsibility as a carrier continues until it has made actual delivery, or done that which may be considered an equivalent to or the substitute for such delivery, and the mere arrival of goods at their destination is not sufficient to reduce the liability of a carrier to that of a warehouseman.[1] The liability of

1. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411; also, see H. & T. C. Ry. v. Adams, 49 Tex. 748, 30 Am. Rep. 116.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 707, providing that the liability of carriers shall be the same as by common law, except as changed by statute, art. 711, providing liability as common carrier shall exist from commencement of transportation till delivery, and art. 712, providing that, if carrier at destination uses due diligence to notify consignee and goods are not taken, it shall thereafter be liable as warehouseman, the obligation of a common carrier as such continues until actual delivery or that which may be considered an equivalent or substitute therefor. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411.

Under the Alabama law, a carrier may, by custom or contract, make a valid "delivery" of freight by merely placing the car upon a side track at a place where it has no agent, and this is true when neither the consignee nor his representative is there to accept it. Ga. Cotton Co. v. Central of Ga. Ry. Co. (Ga. 1917), 91 S. E. 933.

Under the Alabama law the clause in the bill of lading that when freight is delivered on a private or other siding it should be at the owner's risk after the cars had been detached from trains, applies to deliveries made within the limits of a corporate city, having a daily mail within Code Ala. 1907, §6137, relating to delivery and notice to consignees. Ga. Cotton Co. v. Central of Ga. Ry. Co. (Ga. 1917), 91 S. E. 933.

Where it is intended that delivery of freight shall be made at a private siding, etc., the Alabama rule is that where by custom or contract the duty of the carrier is performed when it places the car on a side track ready for unloading by the consignee, the liability of the carrier as carrier ceases. Ga. Cotton Co. v. Central of Go. Ry. Co. (Ga. 1917), 91 S. E. 933.

Where cattle shipped to Kansas City with privilege of Wichita were unloaded at Wichita, at shipper's request, and after 24 hours were reshipped to Kansas City, no recovery against the carrier could be had for

the carrier ceases upon delivery at point of destination, cordance with the direction of the shipper or according t

delay and shrinkage at Wichita. P. & S. F. Ry. Co. v. Harp (Tex. 1917), 193 S. W. 438, 439.

Not only is the carrier liable for negligence during transit, but it may be guilty of negligent acts after arrival for which it is responsible. If it improperly stores the freight, or does not take the right care of it, it is responsible. So where a carrier of livestock agrees to dip cattle in an arsenic dip, it is liable if it fails to properly clean its pens in which it had given them a petroleum dip so that the oil left in the pens mixes with the arsenic and thereby injures the cattle. M., K. & T. Ry. v. Cauble (Tex. 1915), 174 S. W. 880.

The liability of the carrier ceases upon delivery at point of destination, in accordance with the direction of the shipper or according to the usage and custom of the trade. Yazoo & M. V. R. R. v. Altman (Ark. 1916), 187 S. W. 656.

But where a shipper of livestock was negligent in failing to unload promptly on arrival, and the stock was injured while waiting, he cannot recover for such injury. C., R. I. & P. Ry. v. Pavillard (Tex. 1916), 187 S. W. 998.

So it seems that in an action for damages to livestock resulting from the carrier's failure to unload them or to notify the shipper of its arrival so that he might unload it, it is a question for the jury to say whether the shipper, in the exercise of ordinary care, should have been present to receive and unload it. C., R. I. & P. Ry. v. Pavilland (Tex. 1916), 187 S. W. 998.

A shipping contract, providi the shipper should take care stock and should unload i should hold the carrier harml cept as to damages resulting the carrier's negligence, does its face, exempt the carrie damages which might result f negligence, contrary to statu when it is found that the co was not at destination to unl stock it was bound to exer least ordinary care to prese from injury, until the co could be notified of the arriv if, under all the circumstance nary care would have requir it be unloaded, the carrier's to do so is negligence. C., I P. Ry. v. Pavillard (Tex. 191 S. W. 998.

A consignee purchased ca Ft. Worth, Texas, which wer shipped to him to Boyd, He expected the cattle to c on a local freight, which c arily arrived at Boyd at ab a. m., but the seller sent th the first train, which arrived a. m. the same day they shipped. The purchaser was Worth when he bought the and left for Boyd that aft so that he did not arrive un or six hours after the catt reached Boyd. The railroad h unloaded them when they a and it seems that the cattl very restless; they had trampl another, were bruised and inj that the same day they were t ed two of them died, and lat others also died. It was hel

under all the circumstances ordinary care required that the carrier unload the cattle, and its failure to do so was negligence. C., R. I. & P. Ry. Co. v. Pavillard (Tex. 1916), 187 S. W. 998.

Under a bill of lading, providing that no carrier should be liable for any loss or damage caused by the act or default of the shipper, and that property not removed by the party entitled to receive it within 48 hours after notice of arrival might be kept in the car, depot, or warehouse at the carrier's responsibility as warehouseman only, or might be stored in a licensed warehouse at the cost and risk of the owner, a licensed warehouseman, to whom the terminal carrier delivered the goods upon performance of the contract of shipment and the buyer's refusal to acept and the shipper's failure to care for them after notice, was the agent of the shipper, through its own default, and not the agent of either carrier. Model Mill Co. v. C., C. & O. Ry Co. (Tenn. 1916), 188 S. W. 936.

A carrier, receiving car loads of potatoes and issuing a bill of lading, showing their consignment to the order of the shipper in New York City, with instructions to notify the purchaser of arrival, and stipulating for "Sixtieth street delivery (lighterage free)," and that they were not to be delivered to any one except on surrender of the original bills of lading properly indorsed, after notifying the purchaser and without receiving the bills of lading, was not justified in unloading the potatoes on the purchaser's direction and at a dock where they were liable to, and did, freeze. Beggs v. New York Cent. R. Co., 162 N. Y. S. 387.

A compress company, as the duly authorized general agent of a cotton company, the shipper and consignee, to receive for it all cotton consigned to it at its place of business over the defendant's lines, and which broke the seals and unloaded the cars, might agree with the carrier as to the manner by which it desired that such deliveries should be made, including deliveries after business hours. Ga. Cotton Co. v. Central of Ga. Ry. Co. (Ga. 1917), 91 S. E. 933.

A railroad is not required to watch a car of livestock sidetracked in a railroad yard to see that it is not injured and moved. Illinois Central R. Co. v. Atkinson & McDonald Co. (Miss. 1917), 74 So. 616.

Evidence that cattle were in good condition when received by defendant railroad and damaged when delivered, and that the injury may have occurred while standing in a railroad yard some five hours, is insufficient to establish defendant's negligence, where it showed the car was sidetracked where none of its employes had the right to move it. Illinois Cent. R. Co. v. Atkinson & McDonald Co. (Miss. 1917), 74 So. 616.

Where livestock is damaged while sidetracked in a railroad yard, defendant carrier may establish its freedom from negligence by proving the customary course of business in the yard, and need not produce each employe to testify that he did not damage the stock. Illinois Cent. R. Co. v. Atkinson & McDonald Co. (Miss. 1917), 74 So. 616.

In Belknap v. Baltimore & O. R. Co. (W. Va. 1917), 91 S. E. 565, the court said, p. 658:

"The contract of shipment bound the carrier to deliver the goods at

the place or station agreed upon. The owner could not be required to accept them elsewhere. Moore on Carriers, p. 238; Elliott on Railroads, §1519; Arthur v. Railroad Co., 38 Minn. 95, 35 N. W. 718; Black v. Ashley, 80 Mich. 90, 44 N. W. 1120; Bank v. Champlain, etc., Co., 23 Vt. 186, 56 Am. Dec. 68."

It is an entirely officious act for a railroad to carry a shipment beyond the destination specified in the bill of lading for which no charge could have been made, and, having done so, it was such carrier's duty to have returned the cotton to destination at its own expense. Hall & Co. v. N. S. R. Co. (N. C. 1917), 91 S. E. 607.

Where potatoes shipped by rail and steamer had been in the steamship company's warehouse at destination to the knowledge of the consignee more than six days, the railroad which handled the shipment was not liable for loss by freezing; its carrier's liability having terminated. Barber v. D., G., H. & M. Ry. Co. (Mich. 1917), 164 N. W. 377.

A carrier may perform its duty to deliver by delivery to the consignee's authorized agent and a consignee may ratify, with knowledge of the facts, a delivery for himself to another who had been previously authorized to accept delivery. Devon Mfg. Co. v. Southern Express Co. (Ala. 1917), 76 So. 39.

An express company rested under an absolute obligation to deliver goods to the consignee. Devon Mfg. Co. v. Southern Express Co. (Ala. 1917), 76 So. 39.

Until reasonable effort to deliver in person has been made, an express company remains liable as a carrier, but if, by custom or regulat the company, limits are fixed which it does not make persc livery, when the character custom or regulation is know consignee, he must govern accordingly. Branch Saw Bryant (N. C. 1917), 93 S. E

In Branch Saw Co. v. Bry C. 1917), 93 S. E. 839, the co p. 840:

"Until reasonable effort to in person has been made, an company remains liable as car however, by custom or regul the express company, limits a beyond which it does not ma sonal delivery, when the cl of such custom or regulat known to the consignee, he m ern himself accordingly. The then proceeds to say:

" 'The rule requiring perso livery does not apply to companies, as they have no f for taking the goods to the re or place of business of the co and the general usage of the ness does not require them t and the same principle is ap to special transportation com 6 Cyc. pp. 466, 467.

"Treating of this matter in ing Case Law, at section 276, 822, it is stated, with referenc press and railroad compani carriers by water:

" 'With respect to the carr water, however, the comm does not require an actual or delivery of the goods into t sesion of the consignee, or warehouse, in order to discha carrier from its liability as Vessels are necessarily confi the water; they only carry fr

to port, or from wharf to wharf. Consequently, general custom, arising from necessity and the convenience of commerce, sanctions a discharge of their cargoes on the wharves, or at public landings as a sufficient and proper delivery. When railways took the place of conveyances drawn by animals, as their routes are in a measure permanently fixed, and not easily varied to suit the convenience or accommodation of the public, necessity seemed to require a relaxation of the rule of the common law requiring common carriers by land to deliver to the consignee personally; consequently, on the ground that a railway has no means of delivery beyond its own lines, universal custom seems to have settled it as being the most reasonable rule that railway companies may discharge themselves of their liability as common carriers by substituting in place of a formal personal delivery a delivery at the warehouse or depot provided by the companies for the storage of goods. Express companies, however, are from the nature of their business held to a very strict degree of responsibility, and must ordinarily make an actual personal delivery."'

A delivery of property, transported by a common carrier, to the consignee, is not made, and does not become effectual, until the consignee is placed in actual or constructive possession of the property. Property, transported in carlots, may be delivered by the placing of the cars in which such property is loaded upon a siding or other convenient place for unloading, at its destination, and the surrender by the railroad company of its dominion over the same to the consignee. Delivery is not effectuated by the railroad company placing the car upon the privately owned switch of the consignee, used in common by the railroad company and the consignee, in the absence of any facts tending to show an intent thereby to surrender possesion and control over the goods, and where the consignee, before he became entitled to the goods in such car, was required to take up a bill of lading therefor, by paying a draft atached thereto, and such consignee did not assume control over such car, or attempt to do so. Levers v. A., T. & S. F. Ry. Co. (N. Mex. 1917), 166 Pac. 1178.

In Levers v. A., T. & S. F. Ry. Co. (N. Mex. 1917), 166 Pac. 1178, the court said, pp. 1180, 1181:

"First, as to the question of delivery: This depends upon whether the railway company had placed in the possession of the elevator company the cars in question. That it did not do so is conclusively shown by the testimony of the secretary and treasurer of the elevator company and the agent of the Houston, East & West Texas Railway Company at Nacogdoches. Both testified that it was a custom of the railroad company, when cars were received at that point with goods consigned to the elevator company, to kick the cars in on the side track in question, but the elevator company did not take possession of such cars, where the goods were shipped by bill of lading with draft attached, until the bill of lading had passed into possession of the elevator company upon the payment of the draft; that the cars were put in upon the siding as a matter of convenience, so that,

signee, breaks the seal of the car, when the bill of lading was taken up, the cars could be moved by hand to the unloading platform of the elevator company.

"We think the evidence conclusively shows that there was no delivery of the cars in question. We attach no importance to the fact that the cars might have been pushed upon that part of the track owned by the elevator company, for that would not affect the rights of the parties, unless such act on the part of the railroad company was intended as a delivery, and was accepted as such by the elevator company. Many cars not intended for the elevator company were, from time to time, placed upon this siding. A delivery of property transported by a common carrier to the consignee is not made, and does not become effectual, until the consignee is placed either in actual or constructive possession of the property. Property transported in car load lots may be delivered by the placing of the car in which such property is loaded upon a siding, or other convenient place for unloading, at its destination, and the surrender by the railroad company of its dominion over the same, to the consignee. In a note to the case of Rothchild Bros. v. Northern Pacific Railway Co., 68 Wash. 527, 123 Pac. 1011, 40 L. R. A. (N. S.) 773, the author of the note says:

"'There is no delivery of a car load of goods by the carrier, where it merely places the car containing them on the unloading track, where such cars are usually placed, and notifies the person for whom the goods are intended, who, without the knowledge or consent of the carrier, inspects the goods, and refuses to accept them, or to pay the draft attached to the bill of lading therefor'—citing Yuille-Miller Co. v. Chicago, I. & L. R. Co., 164 Mich. 58, 128 N. W. 1099.

"See, also, Anchor Mill Co. v. Burlington, C. & N. R. Co., 102 Ia. 262, 71 N. W. 255; Schopp Fruit Co. v. Missouri P. R. Co., 115 Mo. App. 352, 91 S. W. 402.

"In the present case there was no delivery. The cars, upon their arrival, were shoved in upon the siding, in a convenient place for unloading, or so placed that they could be easily moved into position for unloading. The bill of lading, however, which had a draft atached for the price of the hay, was not delivered and the consignee exercised no dominion or control over the property. It did not even break the seals of the cars in which the hay was loaded, and the evidence shows, without dispute, that the course of dealing between the railroad company and the elevator company was such that the elevator company, where goods were shipped under a bill of lading with draft attached, always took up the bill of lading and presented it to the railroad company before taking possession of the property.

"We attach no importance to the fact that the legal title to the part of the switch upon which the cars were placed was in the elevator company. If the placing of a loaded car upon such switch constituted a delivery by the railroad company to the elevator company, the railroad company would be in the anomalous position of delivering to the elevator company and without authority from the con-

many cars of freight not intended for it, and the elevator company would become liable for the loss of all goods placed upon its switch by the railroad company. By placing the cars upon the switch, the railroad company did not surrender its dominion over the property or control of the same. The cars were simply placed there as a matter of convenience, without intending to make a delivery, and such act was not accepted as a delivery by the elevator company.

"(2) Nor were the post cards, mailed to appellee, sufficient evidence of delivery to warrant the judgment. That the agent erroneously stated that the cars had been delivered is clearly shown by the facts and circumstances in evidence. In the case of Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., *supra*, the agent of the railway company at the point of destination wired the agent at point of origin, in response to an inquiry, that goods had been delivered, and the shipper was so notified; and it was held that the railroad company was not estopped to deny delivery, in an action for conversion. Here, as in that case, communications between the shipper and consignee clearly indicated there had been no delivery. The elevator company wired for the privilege of inspecting the hay, and inspection was granted, and this before appellee received the cards from the agent; and this fact should have satisfied appellee that delivery had not been made, as stated in the cards. Even after appellee received the cards, he acted upon the assumption that delivery had not been made, until he ascertained that the elevator company would not accept the hay. When he became convinced of this fact, evidently he decided to hold the railroad company responsible, and notified it that he would hold it responsible for having delivered the property contrary to instructions."

At common law, when it became impossible for a common carrier to deliver shipments in accordance with the contract of carriage, it was its duty to exercise ordinary care and diligence for the protection of the property of the owner. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where a carrier is unable to deliver the goods, which have been shipped through connecting carriers, the Carmack amendment treats such carriers as if they were controlled by a single corporation, and the initial carrier is not relieved of its duty to notify the consignor because the terminal carrier did not know his residence; such carrier being chargeable with the knowledge of the initial carrier thereof. Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Of course the carrier must provide the proper facilities for taking care of such goods as it has not been able to deliver. This is particularly true with respect to live-stock shipments.

A railroad, not having provided facilities for feeding horses shipped while they were in its charge, and before delivery to the consignee, became liable for any damage sustained by the shipper by reason of the animals having been deprived of food for a period in excess of 36 hours, whether the horses were in the cars

or in the stockyard awaiting delivery, the federal statute permitting the confinement of livestock without food and water by request of the shipper for 36 hours. Dee v. San Pedro, L. A. & S. L. R. Co. (Utah 1917), 167 Pac. 246.

In Dee v. San Pedro, L. A. & S. L. R. Co. (Utah 1917), 167 Pac. 246, the court said, p. 252:

"It does seem to us that, until the animals in question could be turned over and delivered to the consignee in the due course of business, the duties of the carrier, whatever they might be, were continuing and did not cease as claimed by appellant when they were turned into the stockyard. To the same effect as the language which we have quoted from the Texas case are many of the cases cited by respondent. In Groot v. Railroad Co., 34 Utah, 161, 96 Pac. 1019, this court announces the same doctrine, and, although it was an action for a tort, the principle is thoroughly discussed and considered. In Railroad Co. v. Gann, 8 Hex. Civ. App. 620, 28 S. W. 349, the court says:

" 'Where a duty is imposed by law on a railroad company to water and feed stock in transit, it is not relieved from liability by showing that the shipper had undertaken that duty, if it appears that by its acts it prevented the shipper from performing it.'

"Railway Co. v. Crawford (Tex. Civ. App.) 146 S. W. 329, is to the same effect. Railway Co. v. Cunningham, 51 Tex. Civ. App. 368, 113 S. W. 767, holds that a stipulation by the shipper whereby he assumes the duty of feeding and watering livestock in transit is void where the carrier does not provide reasonable facilities for that purpose. The Texas Court of Civil Appeals in Chicago, R. I. & G. N. R. Co. v. Scott, 156 S. W. 297, holds that a provision in the shipping contract whereby the shipper assumes the risk and expense of feeding, watering and otherwise caring for livestock while in cars, yards and pens, etc., is void. Respondent cites also Burns v. Chicago, Milwaukee & St. Paul R. Co., 104 Wis. 646, 80 N. W. 927; Reynolds v. Great Northern Ry. Co., 40 Wash. 163, 82 Pac. 161, 111 Am. St. Rep. 883; Smith et al. v. Railway Co., 100 Mich. 148, 58 N. W. 651, 43 Am. St. Rep. 440; Grieve v. Ill. Cent. Ry. Co., 104 Iowa, 659, 74 N. W. 192; Railway Co. v. Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Ward v. Railway Co., 87 Kan. 824, 126 Pac. 1083, and many other cases, all of which are more or less in point on the question now under review.

"As we view this question under the evidence, appellants, not having provided facilities for feeding the horses during the time they were in its charge, and before delivery to the consignee, became liable for any damage sustained by the shipper by reason of the animals being deprived of food for a period of time in excess of 36 hours, whether the horses were in its cars or in the stockyard awaiting delivery. Appellant's assignments of error on this account should not prevail."

Where the shipper of hay by rail was ignorant of the fact that delivery had been made without payment of the draft attached to the bill of lading and the proper production of the bill, her directions to a broker at destination by letter to

usage and custom of the trade.[2] The liability of a carrier as an insurer continues until a reasonable time in which to make delivery has elapsed, after which it holds the goods in the capacity of a warehousman. There is no presumption that a purchaser received goods from the mere fact that they were delivered to a railroad company for transportation to it.[3]

2. **Property on Private Sidings.** The carriers have generally carried in the bill of lading a provision that when property is delivered on private sidings or at non-agency stations, their liability as an insurer shall end, and they shall be liable only as warehousemen. It is very evident that this provision has been void under the Cummins Amendment because if the circumstances were such that the carrier's liability had attached, then the limitation was void, and if the carrier's liability had not attached, then, of course, it was not liable as an insurer. In prescribing the new bill of lading, the Interstate Commerce Commission very exhaustively discussed this question as follows (52 I. C. C. 714): "Section 4, Clause 9, Receipt or Delivery of Property at Private or Other Sidings, Wharves, Landings, etc.—Section 5 of the present uniform bill of lading provides: 'Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at the risk of owner after unloaded from cars or vessels or until loaded into cars or

make the best possible disposition of the hay after the party to whom the hay was sent rejected it did not ratify or waive the act of wrongful delivery by the railroad. Barton v. L. & N. R. Co. (Mo. 1917), 196 S. W. 379.

Where a carrier, with whom sheriff left replevined property, failed to deliver it to the defendant in replevin, who gave bond, but turned it over to the plaintiff in replevin, and defendant thereupon sued in trover, tendering the issue of title, which was resolved against him, the defendant in trover was not liable, since the bond given by defendant in replevin did not confer title, but at most mere right of temporary possession. Abasi Bros. v. L. & N. R. Co. (Miss. 1917), 76 So. 665.

A shipper of horses cannot recover from a carrier for death of animals after arrival, in the absence of evidence connecting their death with the delay in transportation complained of. Plass v. Barrett, 168 N. Y. S. 107.

2. Yazoo & M. V. R. R. v. Altman (Ark. 1916), 187 S. W. 656.

3. Branch Saw Co. v. Bryant (N. C. 1917), 93 S. E. 839.

vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at the owner's risk until the cars are attached to and after they are detached from trains.' A similar provision at present incorporated in the revised standard form of bill of lading, and constituting Clause 9 of Section 4 of the proposed bill, reads as follows: 'Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and, except in case of carrier's negligence, when received from or delivered on private or other sidings, or on such wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains or unloaded into and after unloaded from vessels.*[3½] The shippers propose the elimination without substitution of that portion of the clause printed in italics above. The practical effect of that part of this provision to which objection is made is to relieve the carrier of all liability, except for its own negligence (for which it would be liable in any event), for loss, damage, or injury caused by it or by any connecting carrier, to property received from or delivered on private or other sidings, wharves, or landings, occurring at any time when the property is not in a car actually attached to a train or actually in or on a vessel. The carriers refer to the fact that a similar provision has long been carried in the uniform bill of lading and ask consideration of the testimony of their traffic and claim officers, 'with the hope that it may be found possible to dispose of the matter so as to conserve all interests.' Evidently this precatory expression is prompted by the disposition of some of the shippers, evidenced during the course of the hearing, to accept a compromise provision. The carriers do not argue the question upon brief, but content themselves with the observation that some of the shippers seem to admit, by inference, that there are some sidings, other than private sidings, on which full common-carrier liability should not be imposed, and contend that there are almost numberless situations where all that can be required of

3½. This provision has been held valid. Chas. Bianchi & Sons v. Montpelier & W. R. R. (Vt. 1918), 104 Atl. 144.

carriers, with respect to property on sidings other than private sidings, is the exercise of ordinary care. The shippers contend that this provision is not only unreasonable, but that it is in open violation of the law; that by their attempt thus to limit their liability to that for negligence only the carriers openly seek to do that which under the law they may not and can not do. Carload freight, when not received and delivered through the carrier's freight or warehouses or upon its docks, is commonly handled upon public team tracks of the carrier or private sidings of the shipper or consignee. It is urged that if a common carrier could limit its liability as proposed, it would, in effect, be liable as a common carrier only in respect of goods received at or delivered from its freight houses. The carriers' proposal must be considered in the light of actual conditions and general practices obtaining where property is received and delivered at private or other sidings, and of the reasonableness and lawfulness of the proposed limitation. At almost every point in this country where freight is received and delivered, carriers have so-called public team tracks at which carload freight is handled. They are owned by the carriers and are therefore comprehended within the phraseology, 'other sidings,' as used in the proposed clause in distinguishing them from private sidings owned or controlled by the shippers. Warehouses, elevators, mills, and other industries of shippers are often located upon side or spur tracks connecting with the carriers' main tracks. These side or spur tracks, generally devoted to the exclusive use of one or a few shippers, may be located upon the carriers' rights of way and owned by them, or they may be privately owned by the shippers. The circumstances and conditions of the use of these private tracks are generally similar to those of public team tracks, except, as stated, the use of the private tracks is generally restricted to one or a few shippers, and is not open to the general public. Public team tracks are indisputably part of the carrier's facilities for the receipt and delivery of freight. They are extensions of its terminal facilities and so, it seems, are private industrial tracks or spurs under certain conditions. Los Angeles Switching Case, 234 U. S., 294. In the absence of statutory prohibition, the carriers might doubtless contract for limitation of their liability as proposed, but the shippers contend that it

is unreasonable and unjustly discriminatory. Upon brief they urge: 'The shipper whose freight is received or delivered upon a siding pays the same rate as the shipper whose freight is received or delivered through the freight house. For the latter the carrier assumes liability from the time of delivery by the shipper to the carrier until the time of delivery by the carrier to the consignee; for the former the carrier now proposes to limit his liability and give to the shipper whose freight is received or delivered on sidings a lesser service and assume a lesser liability than is given to and assumed for the shipper whose freight is received and delivered through the freight house. But to both the same rate is charged. Such a condition would create an unjust discrimination against the shipper whose freight is either received or delivered upon a siding. That shipper is entitled to the same degree of liability upon the part of the carrier as other shippers paying the same rate. * * * The condition proposed by the carriers is also unreasonable. As pointed out above the property in detached cars after delivery by the shipper or before delivery by the carrier is in the full possession of the carrier. The carrier's duty toward the property does not cease with the breaking up of trains and it begins before trains are assembled. During the entire course of transportation, which begins with the delivery of the shipment by the loading of it into the car and ends with the delivery of the property by unloading it from the car, the carrier's liability should continue. The shippers have a right to demand such liability and the carriers have no reasonable ground for restricting it.' The carriers' proposal does not directly involve any of the mixed questions of law and fact as to when property has been delivered to a carrier and its liability as such begins. It is, in effect, a proposal to limit or defer the attachment of that degree of liability until the property, after having been received for transportation, and after having come into the custody and under the absolute dominion of the carrier, shall have come into a certain condition or position incidental to the actual transportation, i. e., until it is loaded into a vessel, or until the car in which it is loaded shall have been attached to a train. So, in respect of shipments transported by a carrier for delivery to a consignee at destination, the proposal would terminate the car-

rier's liability, as such, even more abruptly and under even less justifiable circumstances than were discussed in a prior part of this report, in connection with the proposal in clause 3 of section 1, to limit the carrier's liability to that of warehouseman after 48 hours after notice of arrival of the property at destination had been duly sent or given. We say more abruptly because, under the proposal we are here considering, the liability would apparently be terminated as soon as a shipment had arrived and been set out of the train in the yards at the destination terminal —even before the giving of notice to the consignee. Then, again, the shipper or consignee would apparently have to assume the risk even though, under the carrier's tariff, it might be entitled to 48 hours or more to remove or unload the property after the receipt of notice of arrival. Indeed, it is not clear how the proposal we are here considering can be reconciled with some of the other proposals of the carriers that we have heretofore considered and discussed, relative to the transition of the carrier's liabiilty from that of an insurer to warehousman. The liability of a railroad company as a common carrier continues after the arrival of the goods in a freight yard at the city of their destination until they have been placed at the disposal of the consignee, though the bill of lading provides that the carrier shall not be liable after the arrival of the goods at their destination. Liverpool & L. & G. Ins. Co. v. M'Neill, 89 Fed., 131. Notwithstanding such a provision in the bill of lading, public policy has been held to so modify the contract as to give the consignee a reasonable time within which to remove the goods after arrival before the carrier's liability as such ceases. Tallassee Falls Mfg. Co. v. Western Ry. of Alabama, 128 Ala., 167. It seems scarcely necessary to discuss the merits of this proposed limitation further, nor, in the view that we take of the matter, is it necessary to consider whether or not it would be in violation of the Cummins amendment. We think the proposal indefensible. The law affords sufficient protection to the carrier in the almost numberless variety of circumstances in which the application of such a limitation in the bill of lading might be invoked. We therefore find that the proposal expressed in italics is and would be unreasonable and should be omitted."

3. **Notice to Consignee of Arrival.** Prior to the order of the Commission prescribing the new form of the bill of lading, it seemed to be the weight of authority that after the carrier has brought the goods to destination it is its duty to give notice to the consignee that the goods are on hand. But in several states it is held that the carrier has discharged its duty as such when it has transported the goods to the place they were destined to, that it is the duty of the consignee to be there to receive them, and that the liability of the carrier after so transporting them, even without notice to the consignee of the arrival of the goods, is that of a warehouseman only.[4] In New York the contrary

4. 2 Hutch. on Carriers, §§702 and 711. 2 Hutch. on Carriers, §708. Stevens & Russell v. St. Louis Southwestern Ry. Co. (Tex. 1915), 178 S. W. 810, 814.

It is presumed that the consignee will know of the time of the arrival of goods in the ordinary course, and it is not necessary, unless made so by contract, in order to change the carrier's relation to the goods to warehouseman to notify the consignee unless there has been an unusual delay in shipment; but where there was an unusual delay and no notice was given to the consignee the railroad was liable to the consignor as carrier, and the provision in the bill of lading for a return of the shipment in ten days if not accepted required notice to the consignee and in absence of notice the railroad was liable for their loss by fire. Danciger Bros. v. Chicago, R. I. & P. Ry. Co. (Mo. 1916), 182 S. W. 120, 121.

On the performance of his contract of carriage in any case, his high obligation as carrier, making him practically an insurer of the property entrusted to him, ceases; but if, for any reason, the owner therefore does not receive it at the place of destination, the carrier is under the milder duty of exercising ordinary care for its safety, until it is called for redelivered, or disposed of in some legal way. He can neither abandon it nor leave it exposed to known danger of loss, destruction or injury. Brown Shore Co. v. Hardin (W. Va.), 87 S. E. 1014.

Where a carrier on being notified of the refusal of the original consignee to pay for the goods informed the consignor, after investigation, that it located the goods and indorsed on the original bill of lading a statement that they were reconsigned to another, a new contract of shipment was entered into which was binding on the carrier, even though not consented to by the original consignee, and the carrier was liable to the second consignee for failure to deliver the goods. A. E. Myers & Co. v. Norfolk Southern R. Co. (N. C. 1916), 88 S. E. 149, 150.

The notice which a carrier is required to give to the consignor of goods which have been taken from its possession by process of law is to enable the consignor to protect

rule is established. There the carrier is charged with the duty of notifying the consignee of the arrival of the goods. So in Massachusetts it has been stated that it seems too clear for

his interest, and was satisfied by a notice given shortly after the property was taken, when, under the circumstances, no notice could possibly have given the consignor an opportunity to protect himself. Danciger v. Atchison, T. & S. F. Ry. Co. (Mo. 1915), 179 S. W. 800.

Where goods were consigned to the shipper at the residence of the purchaser by bill of lading with draft attached providing for notice to purchaser, and the purchaser did not accept the goods, there being a local custom that the railroad company should notify the shipper within 48 hours if a car is refused or not accepted upon arival, its failure to give such notice was a breach of contract, although the purchaser had not notified the railroad that he refused to unload the car. South Deerfield Onion Storage Co. v. New York, N. H. & H. R. Co. (Mass. 1916), 111 N. E. 367.

While in some states it may be considered the duty of the consignee to know when to expect the goods, and to be ready for them when they arrive, yet if the carrier officiously removes them from the original destination, and transports them to another place, it is not the duty of the consignee to know when the carrier has returned them. Generally speaking, however, it is the carrier's duty either by custom or law to notify the consignee of arrival. This it not the universal rule, as under the decisions of some of the states it is the duty of the consignee to know when to expect the goods and to be ready for them when they arrive. However, a carrier's unauthorized and wrongful removal of goods from their place of destination, after delivery there, imposes upon it duty to notify their owner of the probable date of return thereto, and omission of such duty subjects the carrier to absolute liability for loss of the goods occurring between the dates of their return and the owner's knowledge thereof. Belknap v. B. & O. R. R. (W. Va. 1917), 91 S. E. 656.

In such case the general rule absolving the carrier from duty to notify the consignee of the arrival of goods at their place of destination and making it his duty to await their arrival and inquire about it does not apply. To make it applicable the carrier must give notice of the date of the return shipment. Belknap v. B. & O. R. Co. (W. Va. 1917), 91 S. E. 656.

A railway company in discharge of its duties under Rev. St. 1911, art. 712, to give notice of arrival of freight at destination, is not bound to look for such person at any place other than that of destination. Texas, N. O. Ry. Co. v. Patterson & Roberts (Tex. 1917), 192 S. W. 585.

The provisions of section 6137 of the Alabama Code of 1907 as to the mailing of notice to consignees by common carriers on the arrival of freight have no application to the responsibility of railway companies of that state as insurers of freight

argument that unreasonable failure to deliver, or, in the case of carriage by water, unreasonable failure to notify the consignee of arrival, is a "failure to carry out and perform" the

when under the contract of shipment is intended to be delivered at a private or other siding, even though such siding be within the corporate limits of a city having a daily mail. Ga. Cotton Co. v. Central of Ga. Ry. Co. (Ga. 1917), 91 S. E. 933.

Notice given to a shipper by an initial carrier that property was held by the final carrier at destination, together with the fact that the property was thereafter delivered by the final carrier to a public warehouse for storage, sufficiently showed that in the meantime the property was held and kept by the final carrier, either in the car, depot, or place of delivery or warehouse of the carrier, as provided in the bill of lading. Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 162 N. Y. S. 549.

The return of a draft and bill of lading to a shipper, with notice that the draft had not been paid, was notice to the shipper that the goods had not been accepted or delivered by the consignee. Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 162 N. Y. S. 549.

Where the freight bill provided for notice of arrival to be given to a designated party, notice to such party was sufficient, and thereafter upon refusal to accept goods the railroad held the property as a warehouseman. Patterson & Roberts (Tex. 1917), 192 S. W. 585.

A railroad which contracted to carry a shipment of cotton to a port, and to deliver to an ocean carrier, was not liable for the ocean carrier's failure to transport the cotton, where the road delivered it on the pier where the steamship was loading in ample time for loading. Louisville & N. R. Co. v. Williams (Ala. 1916), 73 So. 548.

Where a railroad contracted to carry cotton to a port, and there to deliver to an ocean carrier for shipment, the road could not complete delivery to the ocean carrier by depositing the cotton on its pier without notice of the arrival of the cotton and its readiness for transfer, and such notice, as affecting the liability of the road to the shipper, must have been timed so as to give the ocean carrier an opportunity to take the cotton aboard for the specified sailing. Louisville & N. R. Co. v. Williams (Ala. 1916), 73 So. 548.

Where a railroad contracted to carry cotton to a port and deliver it to an ocean carrier for shipment to a foreign port, the burden was on the railroad, as against the shipper, to show that it gave notice to the ocean carrier of the arrival of the cotton at the pier in time for the ocean carrier to have taken the cotton aboard ship for the intended sailing. Louisville & N. R. Co. v. Williams (Ala. 1916), 73 So. 548.

A bill of lading, issued to shipper's order, notify a third person, signifies the shipper is consignee, and that the third person is to be notified on arrival of the shipment, and delivery to such person without requiring him to produce the bill of lading is a

carrier's contract.[5] Furthermore it seems that the notice of arrival should be reasonably specific so as to notify the consignee of what the shipment is. So a receiver of freight engaged in the millinery business may be excused for failure to respond to a notice sent to it by a railroad which specifies that the carrier has on hand a shipment of shoes consigned to such person, although it afterwards appears that such shipment really consisted of velvet, and can recover damages for delay in delivery of the velvet.[6] But it is the duty of consignees at non-agency station, under the provisions of the uniform bill of lading, to look out for the arrival of their freight, and they are not entitled to notice of same.[7] Hence a stipulation which provides that where the packages are consigned to a station where the carrier has no agent, the shipper authorizes and directs the carrier upon arrival of the train, by day or night, and regardless of the weather, to deposit the goods or packages upon the platform whether there be anyone there to receive them or not, "and the shipper agrees that the carrier's liability shall end upon such de-

conversion by the carrier. Barton v. L. & N. R. Co. (Mo. 1917), 196 S. W. 379.

Where goods are shipped to the consignor's order, and the bills of lading are sent to a bank at destination, such bank is the consignor's agent for the purpose of presenting the draft only, and not for the purpose of receiving notice that the goods cannot be delivered. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where goods are shipped to the consignor's order with directions to notify purchaser thereof, the carrier will not be relieved of its duty to exercise due diligence in caring for goods because of the fact that the consignee is derelict in his duty to receive the goods. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

In an action against a common carrier for damages due to failure to give the consignor notice of nondelivery, where the bill of lading provided that the purchaser should have ten days within which to pay for the goods, the duty did not devolve upon the carrier to give notice of nondelivery until after the expiration of such ten days.

5. Norway Plains Co. v. B. & M. R. R., 1 Gray, 263, 61 Am. Dec. 423; Mansur v. New England Mutual Marine Ins. Co., 12 Gray, 520, 526. Ideal Leather Goods Co. v. Eastern S. S. Corporation, (Mass. 1915), 107 N. E., 525, 527.

6. A. E. Wood & Co. v. M. C. R. Co. (Mich, 1915), 151 N. W., 601.

7. Morrison Tent & Awning Co. v. I. C. R. R. Co.., (Mo. 1915), 175 S. W., 220, 222.

posit, and that such deposit shall be considered a delivery to the consignee," does not require notice to be given to the consignee of the arrival of freight nor in any way guarantee that the freight train will move by schedule, or be there at a certain time.[8]. But, of course, the shipment must be transported with reasonable despatch.[9] In an action for the value of a shipment of onions while in defendant carrier's possession, where there was evidence that the shipment on arrival was never removed to a storage house, and no evidence that the car was ever located on the carrier's unloading track, or at any other convenient place, its liability was not changed from that of a common carrier to a warehouseman.[10] That a notice by a postal card, properly addressed and mailed, from the carrier to the consignee, of the arrival of a shipment, was received, would be presumed in the absence of evidence to the contrary.[11] So the mailing and contents of a postal card from a carrier to the consignee announcing the arrival of a shipment may be shown by parole in an action by the consignee to recover the goods which the carrier claims for storage, the mailing and contents being matters collateral to the issue and not the subject matter of the litigation.[12] However, the Commission in prescribing the new form of Bill of Lading expressly provides that notice of arrival must be given to the consignee, stating (Bill of Lading Report, 52 I. C. C., p. 701): "What we are really dealing with are certain rules, regulations, and practices of the carriers, viz., those upon which the question of the termination of the carrier's liability as such would cease under the law and its liability as a warehouseman

8. Morrison Tent & Awning Co. v. I. C. R. R. Co., (Mo. 1915), 175 S. W., 220, 221.

9. See *infra*, Chapter III.

10. Chicago, R. I. & P. Ry. Co. v. Stouffer (Ind. 1916), 111 N. E. 809.

11. Holloman v. Southern Ry. (N. C. 1916), 90 S. E. 292.

12. Hollman v. Sou. Ry. (N. C. 1916), 90 S. E. 292.

Although a railroad company has been notified through one of its agents that a certain person has not ordered any intoxicating liquors, and would not receive any, it was, nevertheless, the duty of the railroad to address a notice by mail to one of the name in which the freight came, or to notify him personally, and for doing so it could not in any way be held liable for damages. Knight v. Southern G. R. R. Co. (Ga. 1916), 90 S. E. 81.

would begin. The primary question is one of fact and as an administrative matter it is both desirable and proper, in order that unnecessary controversy may be avoided, that a reasonable rule should be adopted for the determination of this question. As a practical matter, it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed. Until they are so placed and tendered for delivery it is obviously impossible for the consignee to receive and remove them and the carrier can not reasonably be relieved of its common-law liability until it has so placed or tendered the goods for delivery. If the consignee, or other party upon whom is the duty to receive the goods, does not remove them within a reasonable time thereafter, the carrier's common-law liability should cease and become that of a warehouseman only. The consignee should have a reasonable time within which to remove the goods after notice has been duly received or given that they are ready for delivery, and the carrier's notice to the shipper should be one which not only notifies him of the arrival of the goods, but also that they are ready for delivery, or that, in the case of a carload shipment, the car has been placed at a designated place for delivery, or that the carrier awaits orders respecting its placement or delivery. This, in substance, is the common law and the established practice of the carriers even in those jurisdictions where, under the strict application of the Massachusetts and New Hampshire rules, they might not be required to give notice." It is also provided in Section 4 that in case the property is lost or destroyed, resulting in non-delivery of the shipment, the carrier must give notice thereof to both the consignor and the consignee.[12½].

4. Notice to Shipper. A great deal of dispute has always existed as to whether it was the duty of a carrier to give notice to the shipper for failure or refusal of the consignee to accept the goods. Up to the time that the Commission prescribed the new form of bill of lading, it seems to have been the weight of authority that where the consignee refuses to accept or fails to accept a shipment, the shipper should be notified. But in

12½. See *infra, notice to shipper.*

order to enable a consignor to recover damages for the failure of the carrier to notify it of the refusal of the consignee to accept shipment, it is necessary to show the damages resulting.[13]

13. Wien v. N. Y. C. & H. R. R. Co., 152 N. Y. Supp. 154, 157.

The question presented is very intricate, and one upon which in former years text writers have disagreed, although at the present time the law seems well settled.

Hutchinson on Carriers, 3rd Edition, page 720, calls attention to the fact that cases have held that if the goods are refused by the consignee, the carrier from that time simply holds them as a warehouseman, and if stored safely its liability is at an end. However, Hutchinson then goes on to say, Section 721:

"But the better opinion would seem to be that the carrier would be bound to presume, from such refusal, that the consignor was still the owner of the goods, and that, to relieve himself from his responsibility as carrier, it would be necessary for him to store them, either in his own warehouse or with some responsible warehouseman, and give notice of the fact to such consignor or owner. If, however, the consignee be the owner, the notice of the storing of the goods, if they are not retained by the carrier in his own warehouse, should be given to him, so that he may know where to call for them if he should so wish. Accordingly, where goods were intrusted to an express carrier, with instructions to collect the price of them upon delivery, it was held to be liable for their loss by depreciation in value, the goods having been kept by the carrier at the place of destination, without notice to the consignor, for nearly a month after they had been tendered to the consignee, and not taken by him, because he was not then prepared to pay for them, although he had several times promised to call and pay for them. But the carrier will not be required to give notice to the consignor that the consignee refused to accept the goods where such notice has been given by the consignee."

Moore on Carriers, 2nd Edition, page 400, states the rule as follows:

"It is quite generally held that when goods sent by a common carrier have arrived at their destination, and have been tendered to and refused by the consignee, the contract for their carriage has been performed and after the consignee has had a reasonable time to call for and receive them, the carrier becomes merely a warehouseman, and responsible for the care of a warehouseman in protecting the consignor's interest and is not bound as a general rule to notify the consignor of the non-acceptance of the goods by the consignee."

However, Moore does not cite the cases which hold a contrary doctrine, the majority of which are very much more recent than the cases he cites. Moore's statement of the law is erroneous, and does not seem borne out by a review of the cases. The Encyclopedia of Law & Procedure, page 474, lays down the same rule as Moore states, but the American & English Encyclopedia on Law. Second Edition, Volume 5, page 222, states the rule to be the same as

In a typical case the purchaser of certain leather goods desired to return them to the seller in order to divest itself of title. The carrier (a vessel) delayed the shipment and did not notify the

laid down in Hutchinson. The very recent cases all take the view that notice must be given to the consignor. Moreover, careful analysis of the cases cited as sustaining the view that notice need not be given to the consignor show distinguishing facts and circumstances. In M. C. R. R. v. Harville, 136 Ill. App. 243, the Court said, p. 253:

"There is no authority which holds that, on refusal of freight by a consignee or non-delivery through other obstacles, notice is not required by the consignor or persons known by the carrier to be owners or interested in the goods. The law is the other way."

To the same effect are the following cases:

Fine v. Barrett, 142 N. Y. S. 533, 81 Misc. 234.

Ala. Grt. Co. Ry. v. McKenzie, 77 S. E. 647, 139 Ga. 410.

N. C. & St. L. Ry. Co. v. Dreyfus-Weil Co., 150 Ky. 333.

Carrizzo v. N. Y. S. & W. Ry. Co., 123 N. Y. S. 173.

Freiberg v. Ry., 30 O. Circt. Ct., 669.

M. C. R. R. v. Harville, 136 Ill. App. 243.

M. K. & T. Ry. v. Groce, 106 S. W. 720.

L. & N. Ry. v. Duncan & Orr, 137 Ala. 446.

American, etc., Express Co. v. Wolf, 79 Ill. 430.

American Express Co. v. Wettstein, 28 Ill. App. 96.

Block v. U. S. Express Co., 68 Atl. 183.

M. K. & T. Ry v. Jenkins, 35 Tex. Civ. App. 429.

Beedy v. Pacey, 60 Pac. 56.

Am. Sugar Ref. Co. v. McGhee, 96 Ga. 27.

From the foregoing authorities and the citations which they discuss it seems the modern weight of authority is that in case of a refusal of goods by the consignee, the carrier is bound to give notice to the consignor.

Where a common carrier is unable to deliver the goods shipped to the consignee, it is its duty to exercise due diligence to notify the consignor within a reasonable time. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where goods are consigned by a shipper to its own order, with directions to notify a person named, upon failure of the carrier to deliver the goods it is not sufficient that it notify such person, but it must notify the consignor, if the bill of lading shows that he is the owner of the goods. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where goods are shipped to the consignor's order, with directions to notify the purchaser of the goods, the carrier cannot extend credit to such person, but must give notice of non-delivery not later than the day following that on which the goods were offered to the purchaser. Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where a common carrier is un-

consignee of the arrival of the goods until three months the arrival of shipment at destination. The shipper (th chaser) sued for damages, both for conversion and for the

able to deliver the goods shipped to the consignee, the burden is upon it to show a state of facts relieving it from its duty to notify the consignor within a reasonable time. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

In an action against an initial carrier for damages because of the terminal carrier's failure to give notice of nondelivery of the goods shipped, admission of evidence of the custom of railway companies to give notice when the shipment cannot be delivered, if error, was harmless, where such evidence only tended to charge defendant with its legal duty. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

The claimants assignors shipped several carloads of box shooks, under an order notify bill of lading, with draft attached, to a consignee in Colorado who was unable to pay the draft, and the shooks remained undelivered for about a month. During this period the peach crop of Colorado was destroyed by frost and thereafter the box shooks were unsalable, as they were only suitable for the manufacture of peach boxes. By the time the shipper was notified of the nondelivery of the goods considerable charges had accumulated against them for freight and demurrage which he refused to pay. Suit was brought for the invoice price of the shipment less sums ultimately realized by their sale by the carrier for charges. The claimant brought suit against the initial carri damages for failure to not shipper that the goods had n delivered

In holding that the claiman recover, the court said, in St Lumber Co. v. Ore.-Wash Nav. Co., *supra*:

"Plaintiff's right of action case is based wholly on its cor that, where goods cannot be de by a terminal carrier in acc with the contract of transpo the duty devolves on such ca notify the owner of the whether he be consignor o signee. This principle is cha by counsel for defendant. Th ity of an initial carrier unc Carmack Amendment is only t posed by the common law on i necting carrier. Adams Expr v. Croninger, 226 U. S. 491, Sup. Co. 148, 57 L. Ed. 314, 4 A. (N. S.) 257. Judson on In Commerce (2d Ed.) §46. Th mon law was evolved before tl of mail and telegraphs. We therefore, expect to find in th mon law anything more than ment in general terms of the devolving on a common carrie it becomes impossible for tl rier to deliver shipments in ance with the contract of c

"The common-law princi that in such case the car charged with the duty of o care and diligence for the pro of the property of the own Elliott on Railroads (2nd 1 1463; 2 Hutchinson on Carrie

age caused through the negligent delay, as the consignee refused to accept the goods. Damages were recovered before a jury. The consignor, notwithstanding a letter of the consignee

Ed.) § 714. What, then, is the duty which ordinary care and diligence, as applied to the conditions under which we live, impose upon a terminal carrier when it is unable to deliver a shipment at the point of destination? The shipments so carried by interstate carriers are of great variety; some of them are perishable, many of them fluctuate in value, many of them are valuable only in limited territories and for short seasons, and their marketing often requires special skill and instruction. It is not to be expected that the terminal agents of the carrier will be advised in all cases of the value of the shipments, or of the proper method of caring for them and protecting their owners from loss. The Interstate Commerce Commission, in the case of Kehoe v. Nashville Co., 14 Interst. Com. Com'n, 555, 556, said:

"'It is in the interest of the public that the consignor should be promptly notified when the shipment is not delivered.'

"We think the interests of the carrier are subserved by a rule which requires notice to the consignor within a reasonable time after the refusal or failure of the consignee to accept delivery. A rule which requires such prompt notification will be of value in releasing the rolling stock of the carrier and making it available for future business. Ordinarily a post card notification would be sufficient.

"There is a conflict of authority on the question as noted by this court in Normile v. Oregon Co., 41 Or. 177, 182, 69 Pac. 928. We think the weight of authority sustains the principle that in such case the carrier must exercise due diligence to notify within a reasonable time. 5 Thompson on Negligence, § 6622; 12 A. & E. Enc. of L. (2d Ed.) 557; Nashville Co. v. Dreyfuss Co., 150 Ky. 333, 150 S. W. 321; American Co. v. McGhee, 96 Ga. 27, 21 S. E. 383; Alabama Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A. (N. S.) 18; Michigan Co. v. Harville, 136 Ill. App. 243, 253; Carrizzo v. New York Co., 66 Misc. Rep. 243, 123, N. Y. Supp. 173; Fine v. Barrett, 81 Misc. Rep. 234, 142 N. Y. Supp. 533; Sauer v. Lehigh Valley Co., 150 N. Y. Supp. 977. This court is partially committed to the doctrine of these authorities. McGregor v. Oregon Co., 50 Or. 527, 536-537, 93 Pac. 465, 14 L. R. A. (N. S.) 668. As applied to interstate shipments, the question is one of federal law, and the federal Supreme Court is the final arbiter. Its decisions trend in the direction of the above rule. The Thames, 14 Wall. 98, 107, 20 L. Ed. 804; North Penn. Co. v. Commercial Bank, 123 U. S. 727, 734, 8 Sup. Ct. 266, 31 L. Ed. 287.

"Circumstances will doubtless arise from time to time which will relieve the carrier from his duty, as, for example, when the owner of the goods has no place of abode. Butler v. East Tennessee Co., 8 Lea (Tenn.) 32, 34. The burden of showing such a state of facts devolves on the carrier. The authorities cited by the defendant state no consistent rule. Some of them hold that the duty of

ritten prior to shipment, refusing to receive the goods, had ıe right, as against the carrier at least, to assume that upon otificaton of their arrival the consignee might decide to accept

:arriers is a variable duty, dependent upon the circumstances. Steamboat Keystone v. Moies, 28 Mo. 243, 246; Manhattan Co. v. Chicago Co., 9 App. Div. 172, 41 N. Y. Supp. 83, 85; Kremer v. Southern Express Co., 6 Cold. (Tenn.) 356. Some of the authorities relied on by defendant involve no question of notice. Fisk v. Newton, 1 Denio (N. Y.) 45, 43 Am. Dec. 649; Ginnochio v. Missouri Co., 153 Mo. App. 598, 134 S. W. 1028. Others of the authorities cited sustain defendant's contentions. Hudson v. Baxendale, 2 Hurlstone & N. 575; Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96. These cases are out of harmony with the weight of American authority, and, in our judgment, are not sustained by sound reasoning.

"The lower court charged the jury in the case at bar that the terminal carrier was chargeable with the duty of due diligence in the protection of the property of plaintiff's assignors, and that, if the jury found that reasonable care of the property required notice to plaintiff's assignors, then the jury should find for plaintiff on this issue. We think the charge of the court was more favorable to the defendant than was warranted by the law.

"The defendant contends that the above principle is inapplicable to this case, because the goods were consigned by the shipper to its own order, with directions to notify Pierce & Maternes; that by this method of shipment the shipper made Pierce & Maternes its agents for the purpose of receiving notice; and that, when the terminal carrier gave notice to Pierce & Maternes, it fulfilled its duty in the premises. This contention of the defendant is supported by the case of Hardin v. Chicago Co., 134 Mo. App. 681, 114 S. W. 1117, 1118. On this issue plaintiff relies largely on the case of Nashville Co. v. Dreyfuss Co., 150 Ky. 333, 150 S. W. 321. The facts in this case are closely akin to those in the case at bar. Plaintiff in the Kentucky case shipped goods from Paducah, Ky., to De Soto, Ga., consigned to itself, with instructions to notify R. E. Howe. Howe was notified by the terminal carrier and refused to take the goods. The carrier neglected to notify plaintiff, and while the goods were held in the carrier's warehouse they were destroyed by fire. The Kentucky court said:

" 'When the goods reached De Soto, Ga., and R. E. Howe, on being notified of their arrival, refused to accept them, it was incumbent upon the carrier to notify Dreyfuss-Weil Company of this fact, for, if they had been notified that their goods were there, they might have taken steps to protect themselves. The bill of lading showed that the goods were the property of Dreyfuss-Weil Company. The goods were consigned to their order. While there is some conflic in the decisions on the subject, th better rule is that, where the co signee refuses to accept the goo the carrier must notify the c signor of this fact if the bill of l ing is sufficient to show that he is

them. It owed no duty to the carrier to acquaint it (the carrier) with the contents of the letter; nor, if it had done so, would the legal duty of the carrier have been changed. Moreover, the burden

owner of the goods. This rule has the approval of the United States Supreme Court and the Supreme Court of Georgia. See Amer. Sugar Refining Co. v. McGehee, 96 Ga. 27, 21 S. E. 383; Hutchinson on Carriers (3d Ed.) § 721. When Howe refused to accept the goods, the carrier held them subject to the shipper's order, and notice to the shipper was essential to his protection. We therefore conclude that the Seaboard Air Line, having failed to notify Dreyfuss-Weil Company of the refusal of Howe to accept the goods, was liable to the shipper for the subsequent destruction of the goods while lying in its warehouse.'

"We think the case last cited correctly states the law. It appears from the books that goods are frequently shipped consigned to the order of the shipper, with instructions to notify some one for whom the goods are intended. North Penn. Co. v. Commercial Bank, 123 U. S. 727, 736, 8 Sup. Ct. 266, 31 L. Ed. 287; 4 Elliott on Railroads, 1427, 1530; 4 R. C. L. p. 842. The purpose of shipping in this manner is plain; it is the intention of the shipper in every such case to exact payment of the purchase price of the goods on delivery. In the case at bar plaintiff proved without objection from the defendant a general custom to ship in this manner, when the shipper is unwilling to extend credit to the purchaser by whom the goods are ordered. The answer shows affirmatively that the purpose and effect of shipping in this manner were understood by the defendant.

"The defendant contends that it should be relieved of the duty to notify in the case at bar, because there was no evidence tending to show that the terminal carrier knew the residence of the consignor. The effect of the Carmack Amendment is to treat a line of connecting carriers as if they were owned and controlled by a single corporation. The terminal carrier is chargeable with the knowledge of the initial carrier, and it appears from the record in this case that plaintiff's assignors had many dealings with the defendant and the defendant must have been apprised of their place of business. We think, furthermore, that no carrier can be held to have fulfilled its duty of due diligence in the matter of notification when it has made no effort to notify the consignor at the place where the shipment originates.

"There is no evidence of a refusal on the part of Pierce & Maternes to receive the goods in question, but the pleadings admit their failure so to do. The defendant contends that this circumstance differentiates the case at bar from the ordinary case, and that the terminal carrier was justified in assuming from day to day that Pierce & Maternes would take the box shooks, thus rendering notification unnecessary. We do not think that the duty of notification arises as a matter of law immediately on the tender of the goods to the purchasers, unless the purchasers refuse

of proof was upon the carrier to show that the nonperformance of its undertaking was for a cause which relieved it from liability.

to accept them. On the other hand, the carrier is unauthorized to extend any appreciable time by way of credit to the purchasers. The fact that the goods are consigned to the order of the shipper is evidence that the shipper is unwilling to extend credit to the purchaser. The principles of the law of agency forbid the carrier to extend to the purchaser a credit which the shipper was unwilling to grant. We think the duty of the carrier to notify is analogous to the duty arising under the law merchant on the dishonor of negotiable paper, and that therefore the notification should not be deferred beyond the day following that on which the goods are offered to the purchaser.

thing done by the defendant, basing

"Plaintiff finds no fault with any-its right of recovery wholly on the liability of the defendant under the Carmack Amendment to answer for the fault of the Denver & Rio Grande Railroad Company, the terminal carrier. The defendant contends that the Carmack Amendment is inapplicable to such a complaint as that made in the case at bar. The amendment in question, in so far as it is material to the present case, is as follows:

" 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may pass.' 34 Stat. p. 595.

"The defendant cites Norfolk Co. v. Stuart's Co., 109 Va. 184, 63 S. E. 415-417; Hogan v. Union Pacific Co., 91 Kan. 783, 139 Pac. 397. These authorities seem to sustain the defendant's contention, but the construction of this statute is a federal question, and the United States Supreme Court has construed it. New York Co. v. Peninsula Exchange, 240 U. S. 34, 37, 36 Sup. Ct. 230, 231 (60 L. Ed. 511, L. R. A. 1917A, 193). This was an action for damages arising from delay in the transportation of medchandise. It was contended that the initial carrier was not liable, inasmuch as no injury had been done to the goods, and the case therefore fell without the operation of the amendment. The court said:

" 'We need not review at length the considerations which led to the adoption of this amendment. These were stated in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 199-203 [31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7]. It was there pointed out that, along with singleness of rate and continuity of carriage in through shipments, there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only "for loss, damage or delay" occurring on its own line. This "burdensome situation" was "the matter which Congress undertook to regulate." * * * The rule, said the

court in defining the purpose of the Carmack Amendment, "is adapted to secure the rights of the shipper by securing unity of transportation with unit of responsibility." * * * It is now insisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured, if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable dispatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words "any loss, damage, or injury to such property" caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury," and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable dispatch is none of the less an integral part of the normal undertaking of the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility.' "

The initial carrier was held liable for the damage sustained. For further authoritative construction of this legislation see Georgia Co. v. Blish Milling Co., 241 U. S. 190, 194, 36 Sup. Ct. 541, 60 L. Ed. 948, and Cleveland Co. v. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453. Under the construction which has been placed by the federal Supreme Court on the Carmack Amendment, we are clear that the defendant is chargeable with the neglect of the Denver & Rio Grande Railroad Company to notify plaintiff's assignors.

"The defendant contends that there was error in admitting evidence of the custom of railway companies to give notice when a shipment cannot be delivered. The evidence objected to tended only to charge the defendant with the duty devolving upon it under the law, and its admission was therefore harmless error, if error at all.

"The defendant strenuously contends that it was the duty of plaintiff's assignors to be present at Hotchkiss to receive the goods. Many of the authorities announce the doctrine that the duty of the consignee to receive and that of the carrier to deliver are correlative duties, equally binding on the parties. An examination of these authorities discloses the fact that the doctrine so announced is incidental to the determination of the question of when the liability of the carrier as an insurer terminates. It is held that the consignee cannot extend the period in which the carrier is an insurer by failure to take the goods when the carrier is ready to deliver them. 2 Hutchinson on Carriers (3d Ed.) § 723. It does not follow that the failure of the con-

signee to take the goods works a forfeiture, or relieves the carrier of its duty to exrecise due diligence in caring for them.

"It is next contended that the bank at Hotchkiss was the agent of plaintiff's assignors, and that therefore the knowledge of the bank was the knowledge of plaintiff's assignors. Inasmuch as this bank knew that the drafts drawn on Pierce & Maternes were not taken up and the bills of lading were not surrendered, it is argued that plaintiff is chargeable with this knowledge. It is alleged in the complaint that plaintiff's assignors sent the respective drafts, with bills of lading attached, to the Hotchkiss bank, with proper instructions. These allegations are admitted by the answer. We think that the pleadings admit that the Hotchkiss bank was the agent of plaintiff's assignors. 3 R. C. L. pp. 610, 622, 624; 1 Mechem on Agency (2d Ed.) §§ 332, 333, 337; 31 Cyc. 1597; Bank v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Wilson v. Smith, 3 How. 763, 769-770, 11 L. Ed. 820.

"It is a familiar and well-settled rule that, as to third parties, notice to an agent while acting within the scope of his authority is notice to the principal. But it is equally as well settled that such notice, in order to bind the principal, must relate to the business or transaction in reference to which the agent is authorized to act for and on behalf of his principal, and to matters over which his authority extends. Story on Agency, § 118; Mechem on Agency, § 718. If it relates to a matter over which the agent has no authority, and concerning which he is not authorized to act for his principal, atlhough he may be an agent for other purposes, it will not affect the principal or be binding on him." Pennoyer v. Willis, 26 Or. 8, 36 Pac. 569, 46 Am. St. Rep. 594.

"The authority of the Hotchkiss bank extended only to the collection in each case of the draft and the surrender of the bill of lading. It had no physical control over the goods or authority to deliver them. There is no evidence that it had any knowledge as to the whereabouts of the freight, and, if it had, such knowledge cannot be imputed to plaintiff's assignors, because it would be without the scope of the agency. The goods should not have been delivered by the terminal carrier without surrender of the bill of lading, but our attention has been directed by the authorities cited in the briefs of these parties to a number of cases where goods have been delivered by the carrier without demanding the bill of lading. See, for example, Georgia Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. It may be that the knowledge imputable to plaintiff's assignors that the drafts were unpaid and the bills of lading unsurrendered was enough to create suspicion in their minds that the goods had not been delivered, but we think the doctrine of constructive notice is inapplicable to this case. The defendant's connecting carrier neglected to notify the shippers. It cannot excuse its neglect by showing that they could have secured the information in question by inquiry from someone else. If the shipper has actual knowledge of the nondelivery of the shipment the carrier will be absolved from liability. 2 Hutchinson on Carriers (3d Ed.) § 721; Manhattan Co. v. Chicago Co., 9 App. Div. 172, 41 N. Y. Supp. 83,

85; Wein v. New York Co., 166 App. Div. 766, 152 N. Moreover, the burden of proof was upon the carrier to show that the nonperformance of its undertaking was for a cause which relieved it from liability. And the shipper was entitled to recover damages, either nominal or otherwise. Ideal Leather Goods Co. v. Eastern S. S. Corporation (Mass. 1915), 107 N. E. 525, 526.

"And under the Carmack Amendment, the initial carrier is liable, not only for the negligent acts and omissions of its employes, but for those of connecting carriers resulting in any loss or damage to the goods en route. Adams Express Co. v. Croninger, 226 U. S., 491, 33 Sup. Ct., 148, 57 L. Ed., 314, 44 L. R. A., (N. S.), 257; Kansas City Southern Ry. Co. v. Carl, 227 U. S., 639, 33 Sup. Ct., 391, 57 L. Ed., 683; Galveston, H. & S. Ry. Co. v. Wallace, 223 U. S., 481, 32 Sup. Ct., 205, 56 L. Ed., 516; Atlantic Coast Line Ry. v. Riverside Mills, 219 U. S., 186, 31 Sup. Ct., 164, 55 L. Ed., 167, 31 L. R. A. (N. S.), 7; Becker v. Pa. Ry. Co., 109 App. Div. 230. 96 N. Y. Supp., 1; Earnest v. D. L. & W. R. Co., 149 App. Div. 330, 134 N. Y. Supp., 323; Coovert v. Spokane, P. & S. Ry. Co., 80 Wash. 87, 141 Pac., 324; Norfolk & W. R. Co., v. Stuart Draft Co., 109 Va. 184, 63 S. E., 415. Wein v. N. Y. C. & H. R. R. Co., 152 N. Y. Supp. 154, 156.

"And also for any loss or damage resulting from the failure of the final carrier to notify the consignee of the arrival of the goods at destination, and for its failure, on the consignee's refusing to accept them, to store the goods for the account of the shipper or to exercise proper care in holding them for him. American Merchants' Union Exp. Co. v. Wolf, 79 Ill., 430; N. C. & St. L. Ry. Co. v. Dreyfuss-Weil Co., 150 S. W., 321, 150 Ky., 333.

Where perishable goods, in good condition when loaded, were kept in a closed car 14 days after arrival before notice to the shipper, there being a local custom that the shipper should be notified within 48 hours after arrival of a car if delivery could not be made, it was held that the jury could find that the resulting loss was caused by the railroad's negligence. South Deerfield Onion S. Co. v. New York, N. H. & H. R. Co., (Mass. 1916), 111 E. 367, 368.

Since a local or special custom of a carrier regulating the delivery of goods forms a part of the contract of shipment, unless it is contrary to law or some provision in the contract. South Deerfield Onion Storage Co. v. New York, N. H. & H. R. Co. (Mass. 1916), 111 N. E. 367.

But when a shipment arrives on time, and the transit is ended, and the carrier puts the goods in its warehouse to await delivery to the consignee, its liability as carrier ceases, although no notice is given to the consignee, and it is thereafter liable only as a warehouseman; but the liability of a carrier does not cease immediately upon the prompt arrival of goods at its destination, but only after the lapse of a reasonable time for their removal by the consignee, and the time when the liability as carrier ceases may depend upon special contracts or local custom. Danciger v. Atchison, T. & S. F. Ry. Co. (Mo. 1915), 179 S. W. 800.

13½. The Commission said (52 I. C. C. 717):

"Section 4, proposed new provision for notice to consignor and consignee

in the case of loss resulting in nondelivery and to the consignor in the case of goods refused or unclaimed at destination.—The shippers propose the incorporation in section 4 of the bill of lading of a new rule providing for notice to the consignor and consignee in case of loss resulting in nondelivery of the property, and to the consignor when shipments are refused or unclaimed at destination. The proposed clause reads as follows:

"Where the said property provided for in this bill of lading is lost or destroyed, resulting in nondelivery of the shipment, the carrier or party in possession shall immediately give notice thereof both to consignor and the consignee. If the property covered by this bill of lading is plainly marked with the name and address of the consignor, or if the carrier's agent at destination has otherwise specific notice thereof in writing, and such property is refused or unclaimed at destination, the carrier or party in possession thereof shall send notice of such refusal or nonclaim to the consignor within such time and by such means as may, in the circumstances, be reasonable."

The shippers advocate the incorporation of such a provision in the proposed bill, because, they say: (1) The observation of such a practice will tend to reduce losses to the shipping public; will obviate the necessity of tracing shipments, and diminish the number of claims; (2) that the proposed provision would be reasonable and requires merely the exercise of due diligence; (3) that it would work no hardship on the carriers, because the consignor could, as a practical matter, be notified only where he had taken the precaution to insure its being done or where the billing plainly indicated the name and address of the consignor; (4) that a similar rule was required to be established by the express companies and is today incorporated in the standard express receipt; (5) that a rule providing for notice to the consignor in case of loss or destruction of the property making delivery impossible would be reasonable, because in such a case knowledge of the fact would be solely in possession of the carrier and prompt notice to the consignor would frequently enable the shipper to minimize his loss and enable him promptly to comply with his contract by replacing the goods; (6) that a rule providing for notice to the consignor in case of goods refused or unclaimed at destination would often prevent the accrual of demurrage and storage charges which might amount to more than any profit that could be expected from the sale of the goods; moreover, the latter may deteriorate or the market price decline; (7) that what all parties should seek to do is to prescribe the best method, both for the carrier and the shipper, that will expedite the transportation of property and limit or lessen the loss to any parties connected with the transaction; (8) that it is now almost a uniform practice for carriers to give notice, substantially as provided for in the clause suggested, and since it is to that extent now regarded by the carriers as good business practice it ought to be made obligatory.

The shippers point out that provisions of the bill of lading already agreed upon provide for notice to

the consignor when nonperishable property is refused or unclaimed at destination, but that under this rule the notice to the consignor is one of intention to sell the property for charges after a certain length of time and that it is not given promptly or within reasonable time; that the rules already agreed upon provide that where perishable property is refused at destination, or the consignee fails to receive it promptly, the carrier may, in its discretion, to prevent further deterioration, sell the same to the best advantage at private or public sale, and that if there is sufficient time to send notice of refusal or failure of the consignee to receive the property, such notice will be sent to the consignor in order that he may give disposition orders, if possible, but, the shippers insist, such notice should be sent to the consignor whether or not there is sufficient time to receive a reply giving such orders.

The shippers explain that the provision that notice may be given "within such time and by such means as may, in the circumstances, be reasonable" means that the carrier shall be expected to make use of the telegraph in case of nondelivery of perishable property, which in many cases might make it practicable for the shipper to give, and the carrier to receive, disposition orders. They say, however, that the carrier should, of course, in any event, be permitted to make disposition of perishable property, if necessary, without awaiting disposition orders.

The carriers seem to be disposed to dispute not so much the desirability of the end sought to be attained by the rule as the propriety of giving it, as they say, a "bill of lading status." Their testimony is to the effect that they are now exerting themselves to give notice to the consignor of property when it is lost or destroyed in a wreck, or when it is refused or unclaimed at destination. They contend, however, that in the case of lost or astray shipments, it would be impracticable to give immediate notice to the consignor, because frequently shipments are mislaid or delayed in transit or go astray and subsequently turn up. Under the operation of Freight Claim Association rules carriers diligently seek to trace lost or astray shipments and to give notice to the shipper or consignee, or both, as speedily as it is practicable to do. They refer, upon brief, to a statement in an opinion of the Supreme Court in Georgia, Fla. & Ala. Ry. v. Blish, 241 U. S., 190, as aptly depicting the circumstances under which carriers necessarily operate, viz., that "the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction." The carriers also cited the case of Kehoe & Co. v. N., C. & L. Ry. Co., 14 I. C. C., 555, as one in which the Commission, having under consideration a claim by the complainant that the delivering carrier should telegraph the consignor in the event of a shipment refused by consignee, or which could not be delivered be-

cause the consignee could not be found, declined to impose upon the carrier the duty of sending a telegraphic notice to the consignor.

The proposed rule, which contemplates imposing upon the carrier two affirmative duties, viz.: (1) notice in case of loss or destruction of property, (2) notice in case of refusal or failure of consignee to claim property at destination, has no bearing upon the degree of the carrier's liability, which is, dependent upon the circumstances heretofore discussed, either that of any insurer of warehouseman. There is no suggestion that the incorporation of the proposed rule in the bill of lading, or its omission therefrom, will either limit or enlarge the carrier's liability under the statute. The duty of railroads in respect to the delivery of property, it may be noted, is different from that of express companies. By custom, usage, and upon grounds of impracticability, the old common-law obligation of carriers to make personal delivery to the consignee is no longer applicable to railroads; it is different, however, with express companies which are, by general custom at least in cities and larger towns, obligated to make personal delivery within defined territorial limits.

At common law "the duty to give notice to the consignor or owner of the goods, in case of their refusal by the consignee, or when he is absent or can not be found, can arise only when the carrier is required to make personal delivery or to give notice to the consignor of their arrival. It has no application to railroad companies when they are only required to deposit the goods in their warehouses to await the call of the consignee without notice to him. * * * The failure as warehouseman to give such notice would not be such negligence as to make them liable in that character for any loss which might be thereby occasioned." 2 Hutch. Carr. (3d Ed.), § 725, citing Merchants, etc., Co. v. Hallock, 64 Ill., 284; Weed v. Barney, 45 N. Y., 344. But it is different, it seems, in jurisdictions where the giving of notice of arrval to the consignee is required, for there, according to what appears to be the better authority, the consignor should be notified. Under the Carmack amendment the initial carrier is liable for any loss or damage resulting from the failure of the final carrier to notify the consignee of the arrival of the goods at destination, and for its failure, on the consignee's refusing to accept them, to store the goods for the account of the shipper or to exercise proper care in holding them for him. American Merchants' Union Exp. Co. v. Wolf, 79 Ill., 430; N. C. & St. L. Ry. Co. v. Dreyfuss-Weil Co., 150 Ky., 333.

We perceive many difficulties in the practical application of a hard and fast rule of the character proposed by the shippers. Goods frequently go astray for a lone time, and afterwards turn up; packages are sometimes marked in such a careless manner as not to be readily identified with the description in the billing. In such cases, it would be practically impossible for the carrier to comply with the strict letter of the proposed rule to give *immediate notice*. The only circumstances in which the carrier

And the shipper was entitled to recover damages,[13a] either nominal or otherwise. However, in its decision prescribing the new form of bill of lading, the Commission definitely stated that it was the duty of a carrier to give such notice to the consignee, and prescribed that the bill of lading should contain a provision to this effect.[13b] The Commission refused to incorporate a provision requiring that such notice be given, but in its discussion of the law it held that it really was the duty of a carrier to give such notice.[13½]

5. Consignee's Right to Inspect. Unless forbidden by the bill of lading the purchaser of goods by sample has the legal right to inspect them on arrival and before payment of the seller's draft attached to the bill of lading and without production of the bill of lading, to ascertain whether they correspond with the sample and if not to refuse to take them.[14] Therefore, an initial carrier is not guilty of conversion when it fails to prevent an inspection by the buyer, prior to his payment of the draft attached to the bill of lading, on the line of the delivering carrier, even though it resulted in the rejection of the goods

could give immediate notice of loss or damage would seem to be, as testified to by carriers' witnesses, in case of wreck, and it is now the practice, at least of many of the carriers, to give such notice. With respect to the second sentence of the proposed rule, others in the bill of lading already agreed upon provide for notice in the manner and under the circumstances therein defined. Moreover, the carriers now have a general custom, as testimony shows, of giving notice to the consignor in the event the property is refused or not claimed at destination. It is a matter of knowledge to the Commission, that under the Freight Claim Association rules and practices, carriers have greatly improved their services in this respect. It is undoubtedly to the mutual interest of the carrier and shipper that such notices should be given, but we have no reason to believe that the carriers fail, in the general conduct of their business, to exercise due diligence and observe to the giving of such notices. We see no reason, therefore, for incorporating a rule in the bill of lading of the character proposed and do not approve it."

13a. Ideal Leather Goods Co. v. Eastern S. S. Co. (Mass. 1915), 107 N. E. 525.

13b. In the matter of Bills of Lading, 52 I. C. C. 701.

14. Model Mill Co. v. Carolina C. & O. Ry. Co. (Tenn. 1916), 188 S. W. 936.

See also, Quinn, Sheperdson Co. v. C. N. Ry. (Minn. 1918), 169 N. W. 422.

and the non-payment of the draft.[15] Although, as will appear, it has been held in the case of order-notify shipments that the consignee has not even the right to inspect a shipment unless the carrier is directed to permit it by the consignor, the same rule apparently does not hold good in case of C. O. D. express shipments. It has recently been held that where an express company received four dresses from a dressmaker shipped C. O. D. to a customer with instructions not to deliver until the full amount had been paid, the customer nevertheless had a right to a reasonable opportunity to inspect them before paying for them and the express company is not liable for the value thereof, for allowing such inspection which resulted in the rejection of three of the dresses by the customer.[16] And, in general, the consignee always has the right to inspect a shipment before accepting it, and the carrier is not liable for permitting such inspection. So where a consignee of goods examined them while in the car without permission or knowledge of the railroad company, and it was not shown to have been negligent, the railroad company is not liable for allowing the inspection.[17] Where sel-

15. Model Mill Co. v. Carolina C. & O. Ry. (Tenn. 1916), 188 S. W. 936.

In this case two hundred barrels of flour were sold, draft attached to a bill of lading, the regular order-notify form being used, which provides that surrender of the bill of lading properly endorsed is required before delivery of the property. The consignee, upon arrival of the flour, claimed the right to inspect it for the purpose of determining whether or not its quantity, condition and quality were the same as that agreed to be purchased. The delivering carrier granted the right of inspection, and the consignee rejected the shipment on the ground that the flour shipped was two grades lower than the sample. The shipper brought suit against the initial carrier for conversion and the court held that the consignee had the right to inspect, and the carrier was not liable for the action of its connection in permitting the consignee to do so. The court said:

"It is clear upon authority that where a carrier grants the right of inspection in such a case, his act does not amount to a conversion of the goods, although it may result in a rejection of the goods and subsequent non-payment of the draft by the drawee. Dudley v. Chicago M. & St. P. R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.), 1135, 112 Am. St. Rep. 102; Hutchinson on Carriers (2d Ed.) Sec. 393; Lyons v. Hill, 46 N. H. 49, 88 Am. Dec. 189; Aaron v. Adams Exp. Co., 276 L. J. 183."

16. Southern Express Company v. Grace (Miss. 1915), 68 So. 172.

17. Elm City Lbr. Co. v. Atl. Coast

lers of hay sent out circulars reciting that they guaranteed their grade and would bill all cars inspection permitted, the railroad company was not liable for allowing inspection of a car under a bill of lading prohibiting inspection unless provided by law or permission was indorsed on the bill or given in writing by the shipper.[18] It takes something more than mere delivery of a carload of freight at the unloading place to constitute a delivery of the subject of the transit into possession of the consignee. Reasonable opportunity for determining whether the carrier has performed its contract or not is required. If the property is found upon inspection, with reasonable diligence, to have been rendered worthless, or to have been materially injured while in the possession of the carrier, the consignee is not bound to accept the setting out of the car as a delivery of its burden. The consignee is not obliged to accept regardless of condition. He is entitled to reasonable time and opportunity to inspect the property and to reject it if rendered worthless or materially injured in the transit, or to take it without acceptance as having been transported according to contract.[19]

Line R. C. (N. C. 1916), 88 S. E. 139.

18. Elm City Lbr. Co. v. Atl. Coast Line R. Co. (N. C. 1916), 88 S. E. 139.

19. Hutchinson on Carriers (3d Ed.) 733; Elliott on Railroads, No. 1528. That is elementary. Berger-Crittendon Co. v. C. M. & St. P. Ry. Co. (Wis. 1915), 150 N. W. 496, 501.

It is, generally speaking, the duty of the consignee to take delivery of the shipment, even though damaged, and afterwards, present a claim against the carrier.

Moody v. So. Ry. Co., 79 S. C. 297; 60 S. E. 711.

Moore on Carriers, 2nd. ed., p. 251 et seq.

The reason for the rule is that the consignee cannot by design nor to promote his convenience deprive the carrier of the right to terminate by delivery its liability as insurer within a reasonable time. Where goods are conveyed to the place of destination and the consignee does not accept, or refuses to receive the goods, the carrier may discharge itself from further responsibility, except as warehouseman, by storing the goods in its warehouse, or in that of some responsible third party, and the goods are then subject to its lien for storage as well as transportation charges. After notice is sent to the consignor, or owner, and the goods held in storage for a reasonable length of time, if the consignee still refuses to receive the goods, the lien may be enforced as provided by law, and the carrier will be discharged from further liability upon accounting for the proceeds.

If the goods are of a perishable

6. Conversion. As modern business increases the situations which carriers confront become increasingly complex. It is the bounden duty of a carrier to deliver a shipment to the correct consignee at the right destination. And, in case of a simple misdelivery of a shipment, or its use by the carrier, this constitutes a clear case of conversion. But there are many other cases in which claimants have sought to hold carriers in this kind of action, and one of the

nature, and it becomes a matter of necessity to sell to prevent a total loss, the carrier may sell them after giving reasonable notice of time and place of sale, and retain its freight and charges from the proceeds. The sale in such case is not in virtue of its lien, but in the interest of the owner. However, in order to relieve itself from liability the carrier must deliver the goods in good condition, and is not justified in abandoning them or negligently exposing them to injury even if the consignee neglects or refuses to accept or receive them after notice of their arrival. Moore on Carriers, 2nd ed., p. 259.

The consignee is not warranted in refusing to receive the goods on account of damage or depreciation in value resulting from delay in delivering, but upon notice of their arrival should receive them and dispose of them to the best advantage, and the measure of damages he is entitled to recover will be the difference between the amount he would have realized if prompt delivery had been made and the amount actually realized. He is entitled to recover only to the extent of the actual injury.

Mills v. National Steamship Co., 5 N. Y. Supp. 258.

Adams Express Co. v. McDonough, 6 Ohio Cir. Ct. Rep. 539.

New Orleans, etc., R. Co. v. Tyson, 46 Miss. 729, 1 Am. Ry. Rep. 474.

Howe v. Oswego, etc., R. Co., 55 Barb. (N. Y.) 121.

Nettles v. South Carolina R. Co., 7 Rich. L. (S. C.) 190, 62 Am. Dec. 409.

The receipt of goods damaged, but yet of some value will not be regarded as a waiver of claim for damages, and failure to receive such goods within a reasonable time will entitle the carrier to offset a claim for storage against the consignee's claim for damage.

Gulf, etc., R. Co. v. Boston, 4 Tex. Civ. App. Cas., sec. 66.

Galveston, etc., R. Co. v. Van Winkle, 3 Tex. Civ. App. Cas., sec. 442.

So, if the goods are so damaged as to be unsafe for removal from the station, and the carrier fail to repair, if they are capable of repair, acceptance cannot be required of the consignee. Moore on Carriers, 2nd ed., p. 261.

So, shortage of goods does not justify a refusal to accept, and if they are sold for freight and storage charges the consignee has no right of action. Moore on Carriers, 2nd ed., p. 261.

The consignee is not bound to accept, however, where only one-third of the goods are tendered, and there is no evidence that they are the original goods shipped.

most frequent is where a creditor may have forced the carrier to deliver a shipment to it by legal process, and the shipper then sues the carrier for conversion. Generally speaking, a carrier is not liable in conversion for a delivery of goods under process of law. In a typical case, an action was brought for the alleged conversion by the carrier of a consignment of goods, shipped from a point in Minnesota to a point in Montana. After the goods arrived at destination they were seized under a writ of replevin issued in an action brought in Montana against the plaintiff. The carrier promptly notified the plaintiff of these proceedings. It was held that it was good defense in an action by the claimant for conversion, if the carrier proved that the legal process under which the property was seized was regular and valid upon its face[20] So, process

Chicago, etc., R. Co. v. Warren, 16 Ill. 502.

Hutchinson on Carriers, 3rd ed., section 1365, well states the rule as follows:

"As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss and sue for their value does not apply to contracts of affreightment. The fact, therefore, that the goods are injured upon the journey, through causes for which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury. Where, however, the damage is such that the entire value of the goods is destroyed the consignee may refuse to receive them and sue the carrier for their value. Thus where a patented machine, while being transported from the manufacturers, was so injured as to be practically worthless and to cost as much to repair it as to buy a new one, it was held that the consignee was justified in refusing to receive it, and might recover from the carrier the value of the machine and the amount paid for carriage with interest from the time when it should have been allowed. But where one of a number of boxes shipped was missing, it was held that the consignee was not justified in refusing to receive the balance, but was bound to accept them and hold the carrier for the missing portion."

20. Burkee v. Gt. Nor. Ry. (Minn. 1916), 158 N. W. 41.

If a shipment be under a shipper's order bill of lading, it is a conversion by the carrier to turn the car over to the consignees before payment of the draft. Patterson & Roberts v. Q. A. & P. Ry. Co. (Tex. 1917), 195 S. W. 1163.

But if goods shipped be perishable, which is a question of fact, and be sold by the carrier in conformity with the statute as to perishable goods, it would not be liable for conversion because thereof, if it tendered the balance of proceeds of sale, after deduction for demurrage and advertising charges. Patterson & Roberts v. Q. A. & P. Ry Co. (Tex. 1917), 195 S. W. 1163.

of replevin used against an interstate shipment while in the custody of the carrier is not invalid, on the ground that the seizure is an interference with interstate commerce.[21] In an action by a bank against a railroad for conversion of automobiles shipped by a company which deposited its draft for the price with the bank as security and later became bankrupt, the bank, holding the bill of lading with draft attached made out a prima facie case of conversion by showing a redelivery of the goods to the consignor without production of the bill of lading, the railroad, to defeat recovery, being bound to show that, notwithstanding the nonproduction of the bill, it delivered to the right party, or that plaintiff's right to the goods was adjudicated adversely in another proceeding by a court or tribunal having jurisdiction of

Sale by the carrier of a shipment of goods as perishable, without complying with the statute, requiring notice by advertising for five days, would be a conversion. Patterson & Roberts v. Q. A. & P. Ry. Co. (Tex. 1917), 195 S. W. 1163.

There is a conversion, where the consignee, after fruitless efforts at adjustment, makes unconditional offer to pay all the carrier's charges, and it refuses the money and sells the goods. Dowling v. Seaboard Air Line Ry. (S. C. 1917), 93 S. E. 863.

In this case claimant purchased a lot of machinery worth about $300.00 which he paid for and which was shipped to him in November, the bill of lading containing the provision that it had to be surrendered before the property was delivered. Claimant lost the bill of lading and did not find it until June, at which time he tendered it with all charges, but the carrier demanded not only the freight charges, but storage charge and advertising charges, and after some argument the claimant agreed to pay all these, but the carrier declined to receive the money and sold the machinery at public sale for $10.00. HELD: if the testimony for the plaintiff was true, then the defendant committed a plain breach of the plaintiff's right. The plaintiff had not sued for loss, damage, or delay of the machinery. The plaintiff testified he offered to comply with every demand of the defendant and was refused a delivery. It is the same as if the defendant had accepted the charges and then refused to deliver the machinery. Dowling v. Seaboard Air Line Ry. (S. C. 1917), 93 S. E. 863, 864.

21. Burkee v. Great Nor. Ry. (Minn. 1916), 158 N. W. 41; Davis v. C. C. C. & St. L. Ry., 217 U. S. 157, 30 Sup. Ct. 463.

Replevin will lie though the property sought to be recovered is not in the actual possession of the defendant, if it is under his control in the hands of another (such as a carrier) so that he may deliver possession of it if he so desires. Burkee v. Great Northern Ry. Co. (Minn. 1916), 158 N. W. 41.

the parties and subject-matter.[22] Unquestionably a carrier is liable for conversion. Conversion is a fact, however, and not a theoretical occurrence. To constitute conversion there must be a distinct act of domination executed over the property contrary to the interest of the owner. "Conversion" is an act of malfeasance and not of mere nonfeasance, and any distinct act of dominion wrongfully exerted over property is a "conversion."[23] In Miller v. Taylor, 164 N. Y. S. 823, the court said, p. 285: "The record fails to show any proof of conversion other than a demand and refusal to deliver the property in question, and that in itself, under the authorities, is insufficient to constitute a conversion abrogating the contract of shipment. There must be a proof of 'an actual conversion,' not one implied from a failure to deliver. Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; D'Utassy v. Barrett

22. Davenport Sav. Bank v. Chicago, R. I. & P. Ry. Co. (Ia. 1916), 158 N. W. 737.

Under a bill of lading stipulating that in case of total loss of any live stock covered by the contract for which the carrier should be liable the value was the actual cash value at the time and place of shipment, in no case to exceed $10 for each calf, and that in case of injury or partial loss the amount claimed should not exceed the same proportion, a recovery on findings of the jury that there was a depreciation of 5 per cent on a valuation of $30, or $1.50 per head, limited the shipper's recovery to 5 per cent of the agreed valuation, or 50 cents per head. (Ed. Note: This holding is probably against the weight of authority. See Chapter VIII.; Partial Loss.) Such agreement in the shipping contract could have no application in the case of the deliberate conversion of an animal or its proceeds by defendant or its agents, so that it was not a loss within the meaning of the contract. In such case, the defendant railroad was liable for the value of the converted animal at destination in the condition in which it would have arrived but for its negligence or conversion. Kansas City, M. & O. Ry. Co. v. Corn (Texas 1916), 186 S. W. 807.

The wrongful refusal of an express company to carry out its C. O. D. shipment contracts will support, in Missouri, an action in conversion by the consignor for the value of the shipments. Abram Rosenberger v. Pacific Exp. Co., 36 Sup. Ct. 510.

23. T. S. & O. Ry. Co. v. Patterson & Roberts (Tex. 1917), 192 S. W. 585.

Where the carrier lost the goods, and there was demand and refusal to deliver them, such facts in themselves are insufficient to constitute a conversion, abrogating the contract of shipment, and to render the carrier liable as for conversion. Miller v. Taylor, 164 N. Y. S. 823.

(1st Dept.) 171 App. Div. 772, 157 N. Y. Supp. 916, affirmed 219 N. Y. 420, 114 N. E. 786, Magnim v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608. While concededly there was a loss of articles in transit from plaintiff's suit case, how, where, or when it occurred we are not told. To sustain a conversion, we are not permitted to indulge in the presumption that the company itself stole the goods, the only theory upon which plaintiff would be able to recover in a conversion action." Where the consignee, knowing goods have been damaged by the initial carrier, accepted them from the terminal carrier, it could not thereafter be heard to say that the damage to the goods amounted to a conversion by the connecting carrier, though a local agent of the terminal carrier agreed that the damages should be paid by the carrier, since such agreement was clearly beyond his authority, as the carrier was under no legal obligation.[24] Where plaintiff's shipment of maize was refused by the consignee and the railway company shipped it to another place and stored it without plaintiff's knowledge or consent, the railway company's action was held not "conversion."[25] Thus a delivery to the wrong person is a conversion because there is an act of domination exercised, namely delivery to a third party contrary to the interest of the real owner. So confiscation of the shipment and use by the carrier is conversion, but mere delay in its transportation, or a temporary detention of the goods by the carrier pending an adjustment of disputed freight charges is not conversion. Even if the freight charges demanded are erroneous it is not necessarily conversion if the condition is one of good faith and there is some doubt as to the proper charges to support the position of the carrier.[26] However, if the charges demanded are clearly

24. Cedar Rapids Fuel Co. v. I. C. R. Co. (Ia. 1916), 160 N. W. 353.

25. T. N. O. Ry. Co. v. Patterson & Roberts (Tex. 1917), 192 S. W. 585.

26. In Belknap v. B. & O. R. Co. (W. Va. 1917), 91 S. E. 656, the court said, p. 658:

"But, if property, it withheld by a carrier and delivery thereof is refused for nonpayment of manifestly illegal charges, it is impossible to perceive any ground upon which the detention can be justified or deemed to be legally right. The shipper cannot be supposed to have impliedly assented to that. It is perfectly obvious that the detention of the property, after its return to Erbacon for nonpayment of charges based upon departure from the contract, is of the same character

erroneous, then serious doubt might well be expressed whether the action of the carrier in withholding the goods pending determination of the correct rate applicable, after a demand has been made by the consignee, and the tender of the correct charges, would not be a conversion. And the measure of damages for conversion of goods by a carrier is the value of such goods at the destination less legal transportation charges.[27] Where a railroad fails to deliver property, or delivers the property to the wrong consignee, it is liable for conversion. The question as to when conversion arises is very interesting. Sometimes the mere refusal of the carrier to deliver is not a conversion. Thus, where the bill of lading authorized the carrier to leave goods on the platform of a non-agency station and the

as the wrongful act for which charges were made, the departure itself, and that it was an illegal act. No plea of ignorance of its character can be indulged, for everybody is conclusively presumed to know the law. Under such circumstances, on refusal of delivery upon demand and tender of the amount actually due, the owner has a right of action, and the carrier is liable to him for any loss that may occur within the period of wrongful detention, because it is wrongful and outside of the contract. Hutchinson on Carriers, § 805.

"If there is ground for reasonable doubt as to whether charges are proper, detention of the goods by the carrier pending an adjustment thereof and determination of the proper amount does not constitute a conversion, so as to render the carrier liable for the value. Moore on Carriers, p. 280; Hett v. Railroad Co., 69 N. H. 139, 44 Atl. 910; Robinson v. Burleigh, 5 N. M. 225; Fletcher v. Fletcher, 7 N. H. 452, 28 Am. Dec. 359; Vaughan v. Watt, 6 M. & W. 492; Hollins v. Fowler, L. R. 7. H. L. 757, 766. But, if the carrier has no lien for the charges for which he detains, he is liable in trover and conversion for detention after demand for the goods. Chandler v. Beldon, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Judah v. Kemp, 22 Johns. Cas. (N. Y.) 411.

" 'Where the carrier wrongfully refuses to deliver the goods, it is liable as for a conversion, and the measure of damages is the same as in any other case of conversion, namely, the value of the goods in the condition they were in at the time of conversion, together with damages for the wrongful conversion by way of compensation for the loss of use of the goods, or legal interest from the date of the conversion less the freight charges.' Moore on Carriers, p. 611.

"Of course, the demand must be accompanied by a tender of any lawful charges constituting a lien on the goods, unless it is excused or rendered useless by the conduct of the carrier."

27. T. N. O. Ry. Co. v. Patterson & Roberts (Tex. 1917), 192 S. W. 585.

train was 50 minutes late, the consignee not being there to receive the freight, and the carrier thereupon placed it in a warehouse, the key to which was left at a neighboring residence, it was not liable for conversion.[28] And a delivery by a carrier upon the order of the consignee to a third person is a complete bar to an action by the shipper for misdelivery.[29] However, where the agents of an initial and connecting carrier changed the bill of lading on a shipment of horses from the order of the shipper, notify bank, to a straight shipment to the bank, without the consent of anyone except the caretaker, who had no authority, there was a joint conversion, and both carriers are liable to the shipper for the value of the shipment. The measure of damages in this form of action against the carrier—that is, as for conversion—is the value of the goods at the place of destination, less the cost of transportation, and with interest thereon under the state statute, (if so provided), if the jury sees fit to give it.[30] In case of conversion the tort involved in the conversion operates to dispel the beneficial provisions of the contract of shipment vouchsafing special privileges and rights to the tortfeasor and remits the matter to be reckoned with on the obligation of an insurer. Because of the tort the law immediately creates a new relation between the parties independent of the contract, in that the carrier is deemed to have abandoned the contract of shipment. In this view it is therefore said he may not thereafter insist upon a stipulation that his liability shall be limited to a certain sum. But there is doubt whether in case of a conversion a released rate would not be binding. As a matter of fact, there should be no reason for holding the carrier liable for greater damages for conversion in case of goods shipped under limited liability than in any other kind of case. Moreover, a shipment under a released rate is really one under a special contract authorized by law, and, under the Interstate Commerce Act, to permit a greater recovery than the value on which the rate is based would seem

28. Morrison Tent & Awning Co. v. I. C. R. R. Co., (Mo. 1915), 175 S. W. 220, 222.

29. Mutual Lumber Co. v. Southern Ry. Co. (S. C. 1915), 84 S. E. 994, 995.

30. 3 Hutchinson on Carriers (3rd Ed.) p. 1640.

an unauthorized departure from the published tariff.[31] It has also been held where the carrier is guilty of a conversion of the goods he cannot escape liability on the ground that the owner failed to present a notice of his claim according to the terms of the shipping contract.[32] So also it has been held, the delivery of goods by a railway company, at a station and to a person to whom the same were not consigned, constituted a conversion, and made the company liable for the full value of the goods, although the contract of shipment fixed upon the goods a valuation less than their real value in consideration of the rate of

31. 1 Hutchinson on Carriers (3d Ed.) 432 et seq.

32. 1 Hutchinson on carriers (3d Ed.), 445. People's State Savings Bank v. Missouri, K. & T. Ry. Co. (Missouri 1915), 178 S. W. 292, 295.

A carrier converting goods shipped under a contract limiting liability to a specified sum at which the goods are valued is, notwithstanding the contract, liable for the full value of the goods. St. Louis, I. M. & S. Ry. Co. v. Wallace (Tex. 1915), 176 S. W. 764.

Where a carrier transported freight to a wrong place, and there sold it as unclaimed freight, it converted it and was liable for its full value, though the contract of shipment fixed a less sum as value, and though a carrier merely losing freight may rely on the limited liability. St. Louis, I. M. & S. Ry. Co. v. Wallace (Tex. 1915), 176 S. W. 764.

The delivery of goods by a railway company, at a station and to a person to whom the same were not consigned, constituted a conversion, and made the company liable for the full value of the goods. Although it (the contract of shipment) fixes upon the goods a valuation less than their real value, which stipulation the shipper agreed to in consideration of the rate of freight being reduced, there is nothing in its terms which would relieve the carrier from damages occasioned by its own negligence in making a wrong delivery. St. Louis, I. M. & S. Ry. Co. v. Wallace (Tex. 1915), 176 S. W. 764, 765.

There is a sound public policy, in preventing a common carrier, who has not shipped under the contract, from maintaining a defense of a lesser agreed value for goods, and in allowing the shipper to recover a greater market value, after the carrier has been guilty of converting the goods. The consequence of such a doctrine, if permitted, can be readily discerned; and though the contract, with the agreed valuation, calls for an interstate shipment, the federal Supreme Court has not held, nor tended to hold, the contract applies to conversion. St. Louis, I. M. & S. Ry. Co. v. Wallace (Tex. 1915), 176 S. W. 764, 766.

It has been said in an action of trover and conversion, good faith cannot be shown as a defense, but only where exemplary damages are claimed, in mitigation thereof. Pecos & N. T. Ry. Co. v. Porter (Tex. 1916), 183 S. W. 98, 99.

freight being reduced, there being nothing in the terms o contract which would relieve the carrier from damages sioned by its own negligence in making a wrong deliv And where a carrier is guilty of a conversion arising fro refusal to deliver a shipment upon payment of the proper t portation charges until a claim it has against the owner is fied, punitive damages are recoverable.[34] An express com receiving shipments of intoxicating liquors to consignees i other state, and which refused to deliver them there becau its laws regulating the delivery of intoxicating liquors, bound to return the packages to the shipper, and its failu do so was a breach of contract, giving the shipper the rig sue for a conversion.[35] But a mere delay in transportati not a conversion.[36] Drafts attached to bills of lading amou positive instructions to the carrier to collect before deliv goods.[37] The carrier delivering goods shipped without pr tion of the bill of lading and payment of the draft attach liable for conversion.[38]

Misdelivery. Side by side with any discussion of the tion of conversion must be considered the question of wh the correct delivery that the carrier is bound to make. Co

33. St. L., I. M. & S. Ry. v. Wallace (Tex. 1915), 176 S. W. 764, 765.

34. Southern Express Co. v. Reagin, 228 Fed. 14.

35. Daneiger v. American Express Co. (Mo. 1915), 179 S. W. 806.

In an action against a carrier for the conversion of freight, the testimony of the freight claim agent of the carrier as to his efforts in tracing the freight was admissible, and he could, when having personal knowledge of the facts, testify as to the remittance to the treasurer of the carrier of the net proceeds of the freight sold as unclaimed freight. St. Louis, I. M. & S. Ry. Co. v. Wallace (Tex. 1915), 176 S. W. 764, 765.

36. It is well settled that delay in delivery of goods do constitute a conversion. Ne delay will not render a carri sponsible for conversion, but for such damages as are the mate result of the delay.

Hutchinson on Carriers, 3 Sections 651, 1372.

If the shipment arrived wi reasonable time, and the con was notified and neglected to r the goods, the carrier is not lia

Hutchinson on Carriers, 3 Sec. 713.

37. International & Great erd Ry. Co. v. Kansas City P Co. (Tex. 1918) 200 S. W. 2

38. International & G. N. R v. Kansas City Produce Co. *Su*

sion is not merely confiscation of goods by the carrier, but it is deemed a conversion if it misdelivers or refuses to deliver. It is the duty of a carrier to not only deliver to the correct party, but to deliver at the correct place. As has been seen, it is the duty of the carrier to deliver the goods to the correct consignee. Now, an actual delivery is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time given in which to remove the goods.[39] A common carrier is bound to deliver goods to the proper person and if it fails to do so it is liable to an initial carrier for the amount paid to a shipper for the loss, whether delivery to the wrong person is made because of an innocent mistake on its part or by reason of the fraud of some third party.[40] Since a bailee has no right to require an indemnity bond as a condition precedent to delivery to its true owner,[41] the carrier of goods has no right to require an indemnity bond as a condition precedent to delivery of goods to the true owner, who had loaded them on to a car placed on a track for the purchaser who was not there to receive them, after notifying the carrier that title was not to pass until payment therefor by the purchaser.[42] In a suit to recover the

39. Yazoo & M. V. R. R. v. Altman (Ark. 1916), 187 S. W. 656.

A delivery is made by the carrier to the consignee at the carrier's peril when the consignee does not surrender the bill of lading. King v. Barbarin 249 Fed. 308.

40. Hill Steamboat Line v. Panama R. R., 160 N. Y. S. 1103.

41. Wilson v. International Ry., 163 N. Y. S. 367.

42. Wilson v. International Ry., 160 N. Y. S. 367.

The rule that an innocent purchaser under a defective title cannot hold personal property as against the true owner, although changed by the Factors Act (Laws 1830, c. 179), now Personal Property Law (Consol. Laws, c. 41) §43, as to purchasers from agents clothed with possession by their principal, still applies to bailees, who are liable for conversion in refusing to deliver the property to the true owner. Wilson v. International Ry. Co., 160 N. Y. S. 367.

In action against carrier charging delivery without indorsement and delivery of bill of lading and payment of draft attached, evidence that the goods were delivered to a railroad company, stranger to the bill of lading, and by it put on side track of drawee of draft, held to show delivery as charged. Dyer v. Atlantic Coast Line R. Co. (Mo. 1916), 186 S. W. 529.

A carrier safely carried and made delivery of a shipment of berries to the consignee, but in the freight or expense bill erroneously inserted the name of W. L. Monstad as con-

value of goods which a carrier has failed to deliver, th
is a question for the jury to determine.[43] Sometimes

signor instead of plaintiff, the owner of the shipment. The consignee paid the consignor so named for the berries. Before this action for the recovery of the value of the shipment was begun, Monstad returned to the consignee the money so received. It is held that when the money was so returned the error was rectified, and no damage resulted to plaintiff from the carrier's carelessless. Cohen v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn. 1916), 158 N. W. 334.

Under the law of Georgia, where there is a delivery of spirits of turpentine by a producer, on cash sale, the title of the seller remains undivested until payment in full of the purchase price, and may be asserted by him even as against a bona fide purchaser from his vendee. Flannery v. Harley, 117 Ga. 483, 43 S. E. 765. A carrier acquires no right, by virtue of its employment as such, to hold goods delivered to it by a wrongdoer to whom they did not belong, until the freight charges are paid as against the claim of the true owner, nor has the carrier any lien on the goods for the transportation charges, S. F. & W. Railway Co. v. Talbot, 123 Ga. 378, 51 S. E. 401, 3 Ann. Cas. 1092. Ocean S. S. Co. v. Southern States Naval Stores Co. (Ga. 1916), 89 S. E. R. 838.

The fact that the common carrier may have received the turpentine from the vendee, who was the apparent owner of the property, would afford the carrier no defense as against the true owner, if it appeared that, while the property was in possession of the carrier, it received notice from the
of his title to the prope
mand for the delivery c
Georgia Railroad Co. v
Ga. 187, 56 S. E. 313, 119
327, 9 Ann. Cas. 677; Oc
v. Southern States Nava
(Ga. 1916), 89 S. E. R.

An action was instit
the common carrier whi
possession of the spirit
time, and on the day of t
of the suit the petitio
served on the common c
that this was sufficient n
title of the plaintiff, and
that the consignor was
owner. In this respect th
from Shellnut v. Central
Ry. Co., 131 Ga. 404, 62
L. R. A. (N. S.) 494.
Co. v. Southern States
Co. (Ga. 1916), 89 S. E.

A steamship company
deliver a cargo as agre
burden of justifying its
perform the contract.
Porto Rico S. S. Co. v. C
trale, 231 Fed. 820.

Where cattle shipped
tucky were consigned t
Co., Chicago, Illinois, c
E., Cincinnati, Ohio," f
firms of cattle brokers
rate cities, Cincinnati b
route of the shipment, it
of the railroad to deliv
ment to the Cincinnati
city. Cincinnati, N. O.
Co. v. Luke (Ky. 1916)
1132.

43. Yazoo & M. V.
Oltman (Ark. 1916), 187

is prevented from delivering, owing to quarantine regulations at destination, because of plague, or something of that kind. In such a case the carrier must use all reasonable precautions to make delivery in various ways and it is a question for the jury to decide whether it has done everything that it is possible to do under the circumstances.[44] Misdelivery of an interstate ship-

44. N. Y. & Porto Rico S .S. Co. v. Guanica Centrale, 231 Fed. 820.

Yazoo & M. V. R. Co. v. Altman (Ark. 1916), 187 S. W. 657.

The court held that it is a question for a jury to determine whether a carrier has made delivery of property, or not, saying, p. 657:

"There is no question but that the liability of the carrier ceases upon delivery of the goods at the point of destination in accordance with the directions of the shipper or according to the usage and custom of the trade, nor that an actual 'delivery' is made when the possession is turned over to the consignee or his duly authorized agent and a reasonable time given him in which to remove the goods. Arkadelphia Milling Co. v. Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680; Hill v. St. L. S. W. Ry. Co., 67 Ark. 402, 55 S. W. 216; Arkansas Midland Ry. Co. v. Moody, 90 Ark. 70, 117 S. W. 757. It is equally true that the refusal of the consignee to accept a shipment from a carrier does not discharge it from all liability, and that it owes a duty to take care of, and cannot abandon the goods or convert them to its own use. C. R. I. & P. Ry. Co. v. Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A. (N. S.) 1107; Railway Co. v. Glidewell, 39 Ark. 487; 2 Hutchinson on Carriers, §685."

In an action for damages to a shipment of live stock by the carrier's failure to unload it on arrival, evidence of a former custom to unload stock shipped to that point when unaccompanied by care-takers was incompetent to abrogate the express terms of a shipping contract requiring the shipper to unload it, if the shipper upon a sufficient consideration executed such contract. Such testimony was also incompetent as against the carrier on the issue of its negligence in failing to unload the stock on arrival, where the issue was as to what, under all the circumstances of the shipment, was required of the carrier in the exercise of due care. Chicago, R. I. & P. Ry. Co. v. Pavillard (Tex. 1916), 187 S. W. 998.

After defendant's steamship had sailed for Porto Rico with a cargo for a number of ports, the first of which named on her cargo report was San Juan, and the last Guanica, about 12 hours' sail from San Juan, quarantine regulations to prevent the spread of bubonic plague were promulgated, under which steamers docking at San Juan were prohibited from going alongside a dock at any other port. Though the San Juan cargo could have been lightered, while there were no lighters at Guanica, and though the vessel might have been stopped, and sent to Guanica and other ports before docking at San Juan, it docked at San Juan, and thus made it necessary to

ment by the terminal carrier must be regarded as "f
make delivery," within the meaning of a clause in th
lading issued by the initial carrier, conformably to the
amendment, which casts upon that carrier responsibil
respect to the entire transportation, that "claims for lo
age, or delay must be made in writing to the carrier at t
of delivery or at the point of origin within four mon
the delivery of the property, or, in case of failure to r
livery, then within four months after a reasonable tim
livery has elapsed."[45] A carrier is bound to deliver g

discontinue its voyage to Guanica. In an action for failing to deliver the cargo destined to Guanica, the court charged that defendant was not liable if it did what the ordinarily prudent man would have done, considering the facts presented to its captain and agent, and that the jury should consider whether a part of the cargo was entitled to greater consideration than any other part, and left it to them to determine whether it acted with reasonable prudence for the interests of all concerned. Held that, the court having fully and fairly presented the case to the jury, it was not error to refuse to charge that the consignee at San Juan was entitled to immediate delivery at the dock, and that, unless it was reasonably apparent that reasonable prudence for the interests of all concerned required such course, defendant would have no right to proceed first to Guanica, nor to discharge the San Juan cargo by lighters. New York & Porto Rico S. S. Co. v. Guanica Centrale, 231 Fed. 820.

The duty of a steamship carrier having a cargo destined for various ports in Porto Rico, at one of which ports bubonic plague existed, making quarantine regulations necessary, was a duty to all of the shippers, and an action by one of the shippe
ure to deliver its cargo
tion could not be dispo
though its goods were the
on board, and the extent
rier's duty to it was to be
by a consideration of all
rounding circumstances.
& Porto Rico S. S. Co.
Centrale, 231 Fed. 820.

That quarantine regulat
in force in Porto Rico un
a steamer, after docking at
would not be permitted to d
other port, did not excus
ure of a steamship company
a cargo at Guanica, if in
cise of ordinary prudence
could have been avoided, a
ering the San Juan carg
ceeding to other Porto R
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and when the company,
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circumstances, permitted th
dock at San Juan, it ass
risk of the damages whi
result if a jury should fin
conduct was negligent.
& Porto Rico S. S. Co.
Centrale, 231 Fed. 820.

45. Georgia, F. & A.
Blish Milling Co., 36 Sup.

trusted to it for shipment at the place of destination named in the contract, and cannot compel the owner to accept them elsewhere.[46] However, a carrier is excused from penalties for misdelivery where it delivers the shipment to the true owner. A consignor shipped an engine to a consignee attaching to the bill of lading a note owed by the consignee for a different account. The engine was the property of the consignee. The carrier delivered without production of the bill of lading. Held, that since the consignee was the true owner, the carrier was not liable for misdelivery.[47] This is true even if the bill of lading is not surrendered and the consignor is thereby prevented from collecting a note attached to the bill of lading.[48] After negotiation of the bill of lading, when the shipper learned that potatoes shipped were decayed and ordered his agent to dispose of them immediately, but the agent told the carrier that he had no authority to get them without a bill of lading, but the carrier nevertheless released them to him without the bill of lading, there was a wrongful delivery, for which the carrier was liable to the holder of the bill.[49] The doctrine that a common carrier, when

46. Belknap v. Baltimore & O. R. Co. (W. Va. 1917), 91 S. E. 656.

47. Schaad Machinery Co. v. St. L., I. M. & S. Ry. Co. (Ark. 1917), 193 S. W. 270.

In Schaad Machinery Co. v. St. Louis, I. M. & S. Ry. Co. (Ark. 1917), 193 S. W. 270, the court said, p. 271:

"A common carrier cannot be mulcted in damages for a misdelivery of goods where shown that the delivery was made to the true owner who was at the time entitled to the possession thereof. Spangenburg v. Steamship, Idaho et al., 92 U. S. 575, 23 L. Ed. 978; Biddle v. Bond, 6 Best & Smith, 225; Western Transportation Co. v. Barber, 56 N. Y. 544."

48. Schaad Machinery Co. v. St. Louis, I. M. & S. Ry. Co. (Ark. 1917), 193 S. W. 270.

49. First National Bank v. G. R. & I. Ry. Co. (Mich. 1917), 161 N. W. 859.

A railroad company received for shipment freight consigned to "shipper's order, notify J. E. H. & Co." The bill of lading indorsed by the shipper was forwarded to a bank at the place of delivery, attached to a sight draft on the purchaser for the invoice price of the freight. The carrier delivered the freight to J. E. H. & Co., without the surrender or production of the bill of lading, on an indemnity bond to protect the railroad company. Because of a misunderstanding as to the terms of the sale, J. E. H. & Co. did not pay the draft, and the bill of lading was returned to the shipper. He sued the railroad company for the value of the goods, fixed in the bill of lading as the bona fide invoice price. The de-

sued by the holder of a bill of lading for the value of fr
received by the carrier for shipment, may show, as an e
for having delivered the freight to another party witho
quiring the surrender or production of the bill of lading,
the party to whom the goods were delivered on demand
the true owner, is founded upon the principle that a bail
property received from a bailor who was not the owner c
acquire any greater right to withhold the property from its
ful owner than if the bailee had bought the property fron
who was not the owner. But that doctrine has no applic
to a case where the party to whom freight was delivered
common carrier was not the holder or owner of the bill o
ing and had no right to receive the goods without the b
lading.[50] And, unauthorized delivery of a car to a shipp
the terminal carrier without surrender of the bill of lading
der the Interstate Commerce Act, renders the initial carri
ble, either in tort for the conversion of the car or on a co
for breach of the contract of carriage.[51] It is the duty of
rier to deliver goods to the correct person to whom they
destined. As to express companies and other carriers hc
themselves out as having facilities for making personal del
there is a presumption, merely from the fact that the carri
dertook to transport the goods, that they were delivered t

fendant called in warranty the principal and surety on the indemnity bond; and the latter contended, as a defense to the main action on the bill of lading, that the reason why the purchaser had not paid the draft or obtained the bill of lading was that the shipper had violated his contract with the purchaser. The plaintiff objected to the introduction of any evidence in support of that defense to the main action. *Held*, that the railroad company could not relieve itself of its liability on the bill of lading to the shipper by taking an indemnity bond in lieu of the bill of lading and delivering the freight to one who was not entitled to receive it without producing and surrenderi
bill of lading, and that the def
and warrantors could not inje
the suit, as a defense to th
action on the bill of lading, th
plaints which the purchaser
freight had against the shipp

Harwood-Bailey Mfg. Co. v
R. Co. (La. 1917), 74 So. 569.

50. Harwood-Barley Mfg.
Illinois Cent. Ry. Co. (La. 19
So. 569.

51. Peycke Bros. Com.
Sandstone Co-op Co. (Mo.
191 S. W. 1088.

consignee.[52] On the face of it, of course, the consignee named in the bill of lading is the person to whom delivery should be made. However, a carrier, which delivers the property to another than the shipper or consignee, has the burden of showing that such other was the true owner, in order to defeat the shipper's action for conversion.[53] If a shipper of property is not the real owner, the carrier may, on demand, turn it over to the true owner, and defeat the shipper's suit for failure to deliver by an affirmative showing that it had turned the goods over to the true owner.[54] The rule that the bailor or shipper is entitled to the property as against the carrier, who cannot himself hold the property by setting up title in a third person, does not apply when the carrier yields to the paramount claim or title of the true owner.[55] It is the duty of a carrier to make delivery to the correct consignee or his authorized agent.[56] Under the

52. Branch Saw Co. v. Bryant (N. C. 1917), 93 S. E. 839.

53. Abasi Bros. v. L. & N. R. Co. (Miss. 1917), 76 So. 665.

54. Abasi Bros. v. L. & N. R. Co. (Miss. 1917), 76 So. 665.

55. Abasi Bros. v. L. & N. R. Co. (Miss. 1917), 76 So. 665.

In suit against an express company for failure to deliver, since the obligation resting on the carrier to deliver to the consignee was absolute, and since a plea in one of its phases relied for exoneration upon delivery to an agent for the consignee, and in another phase on ratification by the consignee of delivery to a person other than himself, the plea, which did not aver sufficient facts from which to deduce the conclusion either that delivery was made to one authorized by the consignee to receive it, or that delivery was ratified by the consignee after being advised of the facts or acts involved in delivery to another, was defective. Devoe Mfg. Co. v. Southern Express Co. (Ala. 1917), 76 So. 38.

In an action for damages against an express company for failure to deliver, a plea merely affirming ratification by the consignee of the act of delivery to another was the allegation of a conclusion of law without the averment of facts justifying it. Dever Mfg. Co. v. Southern Express Co. (Ala. 1917), 76 So. 39.

56. Persons authorized to take possession of the contents of a car containing a shipment of fruit had such possession as entitled them to sue the carrier for conversion of the fruit, and the carrier, having recognized their authority and accepted a receipt from them for the contents of the car, could not question their right of possession. Ft. Worth & D. C. Ry. Co. v. W. A. Nabors Fruit Co. (Tex. 1918), 200 S. W. 420.

In a consignor's action for misdelivery, evidence that the person to whom delivery was made acted for the consignee partnership in transac-

straight bill of lading approved by the Interstate Commerce Commission a carrier may deliver to the consignee named in such bill of lading. It seems to be held that he may make such delivery even though such bill of lading has stamped on it that a draft has been drawn on the consignee and that the property should not be delivered unless the draft is paid, because if the consignor desires to protect himself by such a transaction he should use the form approved by the Interstate Commerce Commission to to used for order-notify shipments.[57] The con-

prima facie proof of such person's autions with the consignor etc., *held* thority to receive the goods, and authorized a directed verdict for defendant carrier, in absence of rebutting testimony. Missouri Iron & Metal Co. v. Texas & P. Ry. Co. (Tex. 1917), 198 S. W. 1067.

In a consignor's action for misdelivery, defendant carrier had burden of showing that individual to whom delivery was made was either a partner or agent of the consignee partnership. Missouri Iron & Metal Co. v. Texas & P. Ry. Co. (Tex. 1917), 198 S. W. 1067.

Where a shipping company, knowing Mexican law required delivery to custom house, induced claimant to ship lumber with bill of lading with draft attached, agreeing to surrender lumber only on surrender of bill of lading, and delivered lumber to custom house, which delivered it with bill of lading, the company was liable for the loss. South Texas Lumber Co. v. Wolvin Line (Tex. 1918), 199 S. W. 1129.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 710, requiring carriers to deliver goods as provided by common law, etc., a carrier is liable for a misdelivery made in good faith and without negligence, unless the error was caused by the consignor. Missouri Iron & Metal Co. v. Texas & P. Ry. Co. (Tex. 1917), 198 S. W. 1067.

The rule that the carrier of goods, upon receiving it for shipment, becomes the agent of the consignee, has no application where the consignor or his agent assumes or takes control of the goods at the point of destination and there exercises such control in delivering the goods to the purchasers. Celli v. Commonwealth (Ky. 1917), 199 S. W. 1.

57. Under a straight bill of lading in the form provided by the rules of the Interstate Commerce Commission, the carrier's obligation is complete when it delivers the goods to the named consignee, and it need not require the surrender of the bill, and notice of the words "draft against B/" on the face of the bill would not increase its obligation; nor does the Personal Property Law, § 227 of New York, operating as notice that the consignor intended to require payment of the draft before the buyer would be entitled to receive and retain the bill apply to an interstate shipment, so as to require the consignee's production of the bill before delivery. Duscal Chemical Co. v. Southern Pac. Co. 168 N. Y. S. 617.

A consignor of an interstate ship-

signee or owner may ratify delivery at a wrong place even though not originally intended to be delivered at such a place. So, where goods originally consigned to St. Louis were reconsigned by the carrier to Philadelphia, and the claimant brought suit for conversion of the goods at Philadelphia, it ratified the unauthorized reconsignment from St. Louis.[58] Very often ship-

ment, intending that the goods should not be delivered to the consignee without the production of the bill of lading, may protect himself by taking an order bill in the form prescribed by the Interstate Commerce Commission, or, if preferring a straight bill, may protect himself by notification to the carrier, under the Personal Property Law, that a third party is the transferee of the bill. Duscal Chemical Co. v. Southern Pac. Co., 168 N. Y. S. 617.

58. In Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367, the court said, p. 372:

"As sustaining the claim of these defendants that the plaintiff ratified the reconsignment to Philadelphia in bringing suit against the Philadelphia & Reading Railway Company as delivering carriers, and basing the liability of the Chicago Great Western on the allegation that it was initial carrier, and therefore liable for the acts of the Philadelphia & Reading Company as delivering carrier, see Converse v. Railway Co., 58 N. H. 521. In that case the plaintiffs contracted to furnish slate to one C. for a schoolhouse which C. was then erecting to be 'cash on delivery.' The slate was ordered directed to themselves at F. Plaintiffs found the goods at the schoolhouse, and workmen engaged in putting it on. C. was not there. They sued C. Soon after C. called on the plaintiff and gave them an order on the school district. The order was not accepted or paid. The plaintiffs were never paid. They commenced an action against C., afterwards dismissed the action, and brought an action against the railroad company as for a conversion. The court said:

"'If the delivery was authorized, the plaintiffs have no claim against the defendants. If the delivery was unauthorized, and they subsequently ratified it, the ratification is equivalent to an authorized delivery, and is an effectual bar to plaintiff's recovery.'

"See, also, Burritt v. New York Central Ry. Co., 76 Misc. Rep. 520, 135 N. Y. S. 557. There a carrier received freight consigned by straight bill of lading to a consignee, and delivered the freight to a third person pursuant to an unauthorized order. Before the delivery the consignee had contracted to sell the freight to a third person, and when he learned of the delivery he sent the third person an invoice dated before the delivery. Subsequently, and with knowledge of all the facts, the consignee paid the carrier the freight charges, and filed a mechanic's lien against the third person and a claim for the value of the freight against him in the bankruptcy court. Held, that the consignee ratified the unauthorized delivery, and could not maintain an action against the third per-

ping instructions are vague so that it is difficult for the carrier to tell just where the property is to be delivered. So, where goods are consigned to the consignee at "Grand Street," it is a question for the jury to say whether such words indicate the residence of the consignee or a terminal station to which the goods were to be delivered.[59] And where goods are consigned to a consignee at "Grand Street" which meant the Grand Street Station, and the carrier delivered them to another station, but subsequently promised to transship them and deliver at the Grand Street Station, which was ultimately done, its conduct is an admission of its own default.[60] A carrier is only authorized to deliver goods

son and a claim for the value of the freight against him in the bankruptcy court. Held, that the consignee ratified the unauthorized delivery, and could not maintain an action against the railroad company for the unauthorized delivery on the theory of conversion. See Theusen v. Bryan, 113 Iowa, 496 85 N. W. 802; Renne v. Townsend, 124 Iowa 332, 100 N. W. 48; Kuhnes v. Cahill, 128 Iowa, 594, 104 N. W. 1025."

59. Loomis v. N. Y. C. & H. R. R. Co. (N. Y. 1915), 108 N. E. 837, 839.

60. Loomis v. N. Y. C. & H. R. R. Co. (N. Y. 1915), 108 N. E. 837, 839.

Where it was the practice of a railroad company to deliver goods only to those teamsters of a transfer company who had a freight sheet signed by certain officers of the transfer company, whose signatures were kept by the railroad company for comparison, the railroad company was not liable for goods delivered to a teamster who converted them, where he was in fact authorized to receive them, though his freight sheet was not properly signed. Parker-Gordon Cigar Co. v. Chicago R. I. & P. Ry. Co. (Mo. 1915), 179 S. W. 785.

A shipper delivered to defendant railway company two shipments of merchandise consigned to C., a station on the line of a connecting carrier, for which only prepaid shipments were received. The freight was prepaid on one of the shipments, but not on the other, the carrier's agent having failed to inform shipper of the fact that it was a "prepay station," and to require prepayment of the charges. The connecting carrier carried both shipments to the next station beyond C., and the consignees refused to accept delivery at that station. One of the shipments was returned to the shipper on payment of freight charges, but part of the contents of the shipment had been purloined and the remainder had greatly depreciated in market value. The other shipment was not delivered to the shipper because it refused to pay storage charges, without the payment of which delivery was refused, and the shipper claimed the full market value of that shipment. Held that the loss in both instances was caused by the fault of one or both

upon presentation of the genuine bill of lading, and any delivery made with that bill of lading outstanding is at its peril, and renders it liable to the holder of the genuine bill.[61] Since the bill of lading is symbolic of the property, it is of considerable importance to ascertain how it may be transferred. There are three different aspects in which a transference of a bill of lading may be considered: 1. As evidence of an intended sale, pledge, or mortgage of the chattels described in the bill of lading, the same as a separate document would be evidence. 2. As an assignment of the shipper's rights against the carrier. 3. As a symbolic delivery of the chattels, equivalent in law to manual delivery. It would seem that there could be no doubt that all these elements characterize the transference of an "order" bill of lading.[62] A "straight" bill of lading is not a true document of title, possession of which is symbolic of actual possession, and the carrier's possession, though not for all purposes the actual possession of the consignee, nevertheless is on his behalf. If the consignor be in truth the owner and the consignee merely his factor, the consignor may transfer his interest as owner to a third person. But for that purpose his assignment on and delivery of the bill of lading are of no greater force than would be a separate bill of sale while the chattels were in the actual possession of the carrier for the factor consignee. For, "strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods."[63] In other words, though the owner consignor may deal with his interest as owner by separate documents (and they are separate even if written upon the bill of lading), he is powerless to disturb the effect of the "straight" bill of lading as against the carrier or the factor consignee without notice. And this is just, because the owner is the one who

carriers, and the initial carrier was liable to the shipper therefor, as its contract with the shipper required it and its connecting carrier to deliver the shipments at their destination, and then had no right to demand that the consignees accept delivery at another station. J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co. (Mo. 1916), 182 S. W. 131.

61. Louisville & N. R. Co. v. McKay & Morgan (Tenn. 1916), 182 S. W. 585.

62. E. White & Co. v. Century S. Bank of Des Moines, Ia., 225 Fed. 975, 977.

63. Conrad v. Atlantic Ins. Co., 1 Pet. 386, 445, 7 L. Ed. 185.

creates the bill and selects its form. Necessarily the transferee of such a bill is bound to take notice of its form and acquires no greater rights than the transferrer had.[64] Where a shipper consigned lumber to its own order, which was misdelivered by the carrier to the consignee without surrender of the bill of lading, and where such shipper did not immediately learn of the misdelivery, and spent a considerable time in fruitless negotiations with the consignee, the fact that after such shipper learned the truth, and that the consignee had used some of the lumber, it sold the remainder to another purchaser and refused thereafter to accept the consignee's offer to take the lumber and pay the full price, was no ground for the carrier, when sued for the misdelivery, to claim that the shipper had not sought to reduce its damages by accepting the consignee's offer to take the lumber, since after breach of the original contract of purchase by the consignee the shipper was not required to break its new contract to accept the consignee's new offer to take the lumber.[65] Where goods are delivered by a steamship company in accordance with the shipping directions of a straight bill of lading issued by the company and stating the contract between it and the shipper, the latter cannot maintain an action for misdelivery.[66] But where a carrier through mistake or fraud has been induced to deliver goods to the wrong person, it may maintain an action against such person for damages.[67] The duty of an express company in respect to delivery of consignments differs from that resting on railway carriers, in that its duty of delivery does not terminate on the arrival of the goods at the station of destination, but it is required to deliver the goods to the consignee in person or to his authorized agent at his place of business or residence.[68] Upon the shipper's mistake in the address of a parcel, an express company was not liable if it went to the wrong place; but if its own

64. C. E. White & Co. v. Century S. Bank of Des Moines, Ia., 229 Fed. 975, 978.

65. St. Louis, I. M. & S. Ry. Co. v. Blisscook Oak Co. (Ark. 1915), 176 S. W. 325.

66. Porter v. Oceanic S. S. Co. of Savannah (Mass. 1916), 111 N. E. 864.

67. Louisville & N. R. Co. v. McKay & Morgan (Tenn. 1916), 182 S. W. 585.

68. Southern Express Co. v. Potter Bros. (Tenn. 1916), 183 S. W. 157.

agent made such mistake it would be bound to deliver it to the proper place, without charge, from the place to which it had been sent, or to return it to the shipper.[69] It has been held that since bills of lading are symbols of property, when properly indorsed and delivered to a bank with drafts for the purchase price of merchandise attached, and the bank pays the amount of the drafts to the drawer, it is entitled to the possession of the merchandise until the drafts are paid in full.[70] In another typical case, in the purchase of a car of wheat by a grain dealer, a bill of lading with a draft attached was forwarded to a bank and was paid and taken up by the dealer. The grain dealer then sold the car of wheat and induced the railway company to issue an exchange bill of lading showing a much larger quantity of wheat than was in the car or shown by the original bill of lading, and to the exchange bill of lading a draft was attached which covered the excess. The agent of the railway company had the original bill of lading before him when the exchange bill of lading was issued, and the grain dealer also knew of the excess and collected for it from the purchaser. When the false bill of lading with the draft attached was presented to the party to which the wheat was sold, it paid the draft and took up the bill of lading. Later the car arrived, and, although the purchaser had then learned of the shortage of grain in the car, it paid the freight on the car and accepted and used so much of the wheat as was in the car, and then sued the railway company, which issued the false bill of lading, and the grain dealer, who procured it to be issued, to recover for the shortage of wheat and also for the freight which plaintiff had been required to pay to obtain the wheat actually shipped. Held, that the purchaser was entitled to recover from the railway company and also from the grain dealer for the loss resulting from the issuance of the false bill of lading, which included not only the shortage of wheat but also the freight charge paid, and it was further held that the railway company was entitled to a judgment against the grain dealer for the amount which it was required to pay on the judgment rendered against it.[71] Sometimes a wrongful delivery

69. Southern Express Co. v. Reagin, 228 Fed. 14. 15.

70. Huffman v. Henry Motor Co. (Nebr. 1915), 153 N. W. 566.

71. E. G. Rall Grain Co. v. M. P. Ry. Co. (Kan. 1915), 146 Pac. 1180.

A railroad, which delivered a car-

becomes ratified. Thus the consignee may accept the goods and give a check for them. But in order to release a carrier from wrongful delivery on the ground that the person injured thereby has ratified the delivery, it must plainly appear that the ratification was intended and took place with full knowledge on the part of those to be affected thereby of all the material facts. [72] In all cases of wrongful delivery by carriers without the surrender of the bill of lading, the controlling consideration in determining whether the acceptance by the shipper of a draft, check, or partial payment from the consignee constitutes a ratification of the wrongful delivery is whether the acceptance of such paper or part payment was intended as a ratification. [73]

—Adverse Claimants. With the question of the correct delivery to be made by the carrier very often arises the question of what delivery must the carrier make in the case of adverse claimants. [73½] Where upon arrival at destination, property is de-

load of beans to a person upon his innocent presentation of a false bill of lading made by his principal, after recovery by the holder of the true bill, might recover against the consignee, on the ground that a party's innocent misrepresentation of a material fact by mistake upon which another party is induced to act is ground for relief in equity as a willful and false assertion, which in either case operates as a surprise and imposition. Louisville & N. R. Co. v. McKay & Morgan (Tenn. 1916), 182 S. W. 585.

An agent innocently presenting a false bill of lading made by his principal, receiving goods from a carrier, and remitting proceeds to his principal, without disclosing his agency to the carrier, held personally liable for the goods received. Louisville & N. R. Co. v. McKay & Morgan (Tenn. 1916), 182 S. W. 585.

Where neither the shipper of a box, nor her agent, the expressman who delivered it to a steamship company for transportation, objected to the terms of a bill of lading which gave the address of the consignee differently from that appearing on the box, in the absence of fraud or any previous agreement the steamship company could rely on the bill of lading issued as expressing the entire contract, and was not liable for delivery to the consignee as indicated therein. Porter v. Oceanic S. S. Co. of Savannah (Mass. 1916), 111 N. E. 864.

72. Kewanee Private Utilities Co. v. Norfolk Southern R. Co. (Va. 1916), 88 S. E. 95, 96.

73. Kewanee Private Utilities Co. v. Norfolk Southern R. Co. (Va. 1916), 88 S. E. 95, 96.

73½. The Federal Bill of Lading Act provides: Sec. 17. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to inter-

manded from a carrier by the consignee and also by an adverse claimant, the carrier is entitled to a reasonable time for investigation, upon its request therefor, before an action will lie against it.[74] Where the adverse claimant claimed no rights under the contract of shipment, and made no claim to the property until after it had arrived at its destination, the carrier owed to him only the duties of a bailee or warehouseman, and may relieve itself from liability by showing that without fault or negligence on its part it was unable to produce or deliver the property.[75] A car-

plead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

74. Taylor v. Duluth, S. S. & A. Ry. Co. (Minn. 1918), 166 N. W. 128.

75. Taylor v. Duluth, S. S. & A. Ry. Co. (Minn. 1918), 166 N. W. 128.

In Atchison, T. & S. F. Ry. Co. v. International Land & I. Co., 247 Fed. 265, the court said, p. 267:

"The rule as commonly stated is that a common carrier is liable in conversion for misdelivery or nondelivery of property intrusted to it for transportation, and that upon the making of an adverse claim and demand by a third person the carrier assumes the risk of correctly deciding between the claimant and the shipper or consignee. The result of this is that, though the carrier is without adequate means of information, it will be held in conversion if it errs in its decision. In the statement of the rule it is generally recognized as productive of much hardship to common carriers impartial as between the contending parties and desirous only of discharging the duties imposed upon them by law. It has been suggested as a possible relief that a carrier in such a position might file a bill of interpleader and bring the parties in to settle their own controversy (Hutch. Carr. § 752), but difficulties of jurisdiction, the loss of market, the perishable character of the property, etc., would seem to impair its adequacy. The hardship of the rule has resulted in adding the compulsion of legal process to the exceptions of 'the act of God and the public enemies,' and it is held that the carrier will be protected against the shipper or consignee if the property has been seized or taken from its possession by attachment, replevin, or search warrant at the instance of a third person. Stiles v. Davis, 1 Black (66 U. S.) 101, 17 L. Ed. 33; Pingree v. Railroad, 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479; Robinson v. Railroad (C. C.) 16 Fed. 57; Bliven v. Railroad, 36 N. Y. 403. The carrier should, however, give notice of the proceeding. It is also settled that it will not be held liable, should it decide correctly and voluntarily surrender the property to the adverse claimant who is in fact the true owner. The Idaho, 93 U. S. 575, 23 L. Ed. 978.

"Although the rule has been broadly stated as above, its concrete application has almost always been in actions by shippers or consignees

rier should, where property in its possession for transportation is seized or taken from its possession by attachment, replevin, or search warrant, give notice to the shipper or consignee of the proceeding.[76] Where a carrier decides correctly, and voluntarily surrenders property in its possession for transportation to an adverse claimant, who is in fact the true owner, it is not liable as for conversion of the property.[77] If conflicting interest claim a shipment the carrier is bound to recognize the title of the true owner and makes a mistake at its peril.[77½]

against carriers for violation of their contractual obligations. Though generally assumed to apply, it has not often been invoked, as in this case, by a stranger to the transportation claiming adversely. Much of the support for this particular application of the rule consists of dictum in cases in which the question was not involved and the general language of text-writers. It is a broad extension of the liability of an ordinary voluntary bailee to common carriers without allowance for the compulsory character of the duties of the latter or the public interest in unobstructed commerce. That there are some differences between an ordinary bailee and a common carrier as regards liability to third persons is clear. Thus in Bates v. Railroad, 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369, it was said that public policy and the proper discharge of the duties imposed upon common carriers require that they should not be held in garnishment for personal chattels in their possession and in actual transit at the time the writ is served. Of the various cases cited for plaintiff's contention, but two, Shellenberg v. Railroad, 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561, and Atchison, T. & S. F. R. Co. v. Jordan Stock Food Co., 67 Kan. 86, 72 Pac. 533, are in point. And the latter was an action in replevin, though, because no writ or order of delivery was issued, it may fairly be said to have been equivalent to one in conversion. On the other hand, in Kohn v. Railroad, 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726, it was held that conversion would not lie upon mere demand; that because of the stringent obligations of a common carrier in respect of transportation, and its difficulties in case of an adverse claim, the demand should be accompanied by legal process. In Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531, the court said:

"'Common carriers, by reason of the nature of their business, which imperatively requires them to receive and forward goods, when tendered in the usual course of their business, have long formed an exception to the stringency of general rules in respect to what constitutes, in similar cases, a conversion.'"

76. Atchison, T. & S. F. Ry. Co. v. International Land & I. Co., 247 Fed. 265.

77. Atchison, T. & S. F. Ry. Co. v. International Land & I. Co., 247 Fed. 265.

77½. Dixon v. S. P. Co. (Nev. 1918), 177 Pac. 14.

8. **Order-Notify Shipments.** Occasionally the question of the correct delivery that a carrier is bound to make is complicated by the fact of an order-notify shipment. A large part of the commerce of the country moves under what is known as order-notify bills of lading. This is a device resorted to by shippers in order to secure cash from consignees to whom they do not wish to extend credit. Originally the carriers did not deliver shipments without production of the bill of lading. The custom thereupon grew up of sending the bill of lading with a draft attached to a bank. The bank would notify the consignee and upon payment of the draft would release to him the bill of lading. As the commercial business of the country grew and the practice of selling in transit became more common a great deal of confusion arose. Consignees would divert shipments and direct carriers to deliver to third parties without requiring the production of the bill of lading. Inasmuch as the consignee is presumed to be the owner of the shipment the carriers followed these instructions. If the shipment was an order-notify one and the consignee by means of diversion or from some other process acquired the shipment without paying the draft, the shipper naturally held the carrier responsible. Considerable litigation arose and a great deal of confusion resulted as to whether the carrier was liable or not. Finally, the carriers adopted a form of bill of lading known as the "order-notify" form, which on its face expressly provides that the carrier will not deliver the shipment without surrender of the bill of lading properly endorsed. There has therefore grown up a branch of the law peculiarly applicable to order-notify bills of lading. The weight of authority is to the effect that an order-notify shipment is notice to the carrier and to the world at large that the seller reserves title to the goods and that he is the only person who can exercise dominion over the shipment until the bill of lading is released either by payment of the draft, or by the shipper waiving payment. In dealing with order-notify shipments it is by no means settled that without surrender of the bill of lading the carrier would not be liable for a misdelivery, if it delivered to the consignee, or to the consignee's order, a shipment made under the regular bill of lading, but sent with draft attached. While the consignee is presumed to be the owner of the shipment it must be remembered that this is only a presumption,

which, of course, may be rebutted. As between seller o chaser, it is a general rule that the title to goods shipped u bill of lading in favor of the seller or his agent with a dr tached does not pass to the buyer until he has complied wi conditions.[78] So where the seller consigned the goods tc at Newport, and sent the bill of lading with draft attache Newport bank, with directions that the bill of lading was be delivered to the purchaser until the payment by it of the the bill of lading was used as a symbol of the property to e the seller's intention as the conditions upon which the pr should be delivered. Hence there was no absolute sale goods, and the goods were at the risk of the consignor ur livered to the consignee.[79] Therefore the delivery of the

It is the duty of a carrier on demand to deliver property in its possession to the true owner, whether it has been received from him or from another as consignor, notwithstanding that in case of conflicting claims, a hardship will be imposed upon it in determining right of possession. Dixon v. Southern Pac. Co. (Nev. 1918), 177 Pac. 14.

78. Case notes to 5 Ann. Cas. 263, and 2 L. R. A. (N. S.) 79. Arkansas Southern Railway Co. v. German National Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; Jersey v. State, 88 Ark. 270, 114 S. W. 216, 44 L. R. A. (N. S.) 463; Midland Valley Rd. Co. v. J. A. Fay & Eagan Co., 89 Ark. 342, 116 S. W. 1171; American Jobbing Assn. v. Wesson, 92 Ark. 287, 122 S. W. 664.

South Deerfield Onion Storage Co. v. New York, N. Y. & H. R. Co., (Mass. 1916), 111 N. E. 367, 368; Alderman v. Eastern R. R., 115 Mass. 233; North Pennsylvania R. R. v. Commercial Nat. Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266, L. Ed. 287.

Where the plaintiff retained title as shipper and consignee, but of lading required that notice to S., the purchaser, he, not paid the draft attached ther quired no title. South D Onion Storage Co. v. New Y H. & H. R. Co. (Mass. 191 N. E. 367.

Where wire fencing was sh a point in this state, with d to notify plaintiff, and the lading was indorsed with a d to deliver the goods on ord trust company, the duty of pl the order or of obtaining a from the consignor to del plaintiff was on the plaint not on the carrier. Killingsv Norfolk & S. R. Co. (N. C 87 S. E. 947.

Goods shipped on an open lading to a consignee who a pay cash therefor by permit consignor to draw on him livered on condition, and, wl condition is broken by the co the title thereto remains in signor. A. E. Myers & Co. folk Southern R. Co. (N. C 88 S. E. 149.

As has been shown, order-notify ıipments are shipments under which ıe bill of lading is attached to a raft and sent to a bank for col-:ction, but the consignee is not ıpposed to take possession of the ;oods until he has paid the draft ınd secured the bill of lading. The ›roper form of bill of lading to be ısed for these transactions further-more provides that surrender of the bill of lading, properly endorsed, will be required before the shipment is delivered. While the delivery must be complete, still through custom, the mere placing of a car on a side track of the consignee may amount to a delivery. Thus, in an action against the carrier charging delivery without endorsement and delivery of the bill of lading in payment of the draft sent, evidence that the goods were delivered to a railroad company, mentioned in the bill of lading, and by it put on the side track of the drawee of the draft, goes to show that delivery was made. In such a case the shipper may abandon the shipment and hold the carrier for the price. Dyer v. Atlantic Coast Line R. R. (Mo. 1916), 186 S. W. 529.

Where the contract of shipment provided for delivery on the shipper's order and instructed the terminal car-ier to notify the consignee of the ·rival of the oats, and the shipper posited the bill of lading with draft ıched, indorsed in blank, in the ', which placed the amount of the ' to the credit of his checking nt, but the terminal carrier in :r state had no knowledge of ransaction, and the consignee l the oats and protested the and the shipper then repur-the draft and bill of lading, :ructed the terminal carrier to deliver the oats to a broker, and it so delivered them, but more than 48 hours after arrival, and after such delivery the broker secured judgment by default against the shipper for $50 less than the value of the oats, the difference being adjusted by stipulation, the shipper could not, as a matter of law, recover from the initial carrier the value of the oats. Hamilton Mill & Elevator Co. v. Stephenville, N. & S. T. Ry. (Tex. 1916), 189 S. W. 774.

Where produce dealers sold a carload of peaches and deposited the draft representing the price, having a non-negotiable bill of lading attached, receiving credit for the amount, the buyers of the peaches had no right of action against the bank for breach of warranty in the sale of the peaches, their claim being solely against the sellers. American National Bank v. Warren, 160 N. Y. S. 413.

Where the buyers of peaches from produce dealers refused to accept the draft representing the price drawn upon them by the dealers, or accepted it and then refused payment, the defense of failure of consideration because of a breach of warranty was available to them against the bank with which the sellers deposited the draft. American National Bank v. Warren, 160 N. Y. S. 413.

Where a draft for the price of peaches sold by produce dealers was accepted and paid by the buyers, and the draft for the price, with a non-negotiable bill of lading attached, which had been deposited in a bank, was surrendered to the buyers, the proceeds of the draft were the property of the bank. American National Bank v. Warren, 160 N. Y. S. 413.

Where produce dealers deposited

with a bank a draft, representing the price of a carload of peaches sold by them, with non-negotiable bill of lading attached, and the bank credited the dealers with the amount, it became indebted to them in the amount, and became the owner of the draft, and, as collateral security, the goods represented by the attached bill of lading. American National Bank v. Warren, 160 N. Y. S. 413.

Accordingly, where a vendor sold spirits of turpentine on cash sale and made delivery to the vendee, and the latter wholly failed to pay the purchase price, but delivered the property to a common carrier to be transported to a distant city, consigned to the order of the shipper, the carrier could not hold the property for freight charges as against the vendor. Under these circumstances, the possession of the carrier was unlawful as against the vendor, and it was liable to the vendor in an action of trover for the value of the turpentine. Ocean S. S. Co. v. Southern States Naval Stores Co. (Ga. 1916), 89 S. E. R. 838.

Isbel-Brown Co. v. Stevens Grocer Co. (Ark. 1915), 175 S. W., 1158, 1159.

It is the well settled law that the carrier has no right to deliver a shipment to a consignee of an order-notify bill of lading without production and surrender of the bill of lading.

Boatmen's Savings Bank v. W. & A. R. R. Co., 81 Ga. 221.

North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727.

Bass v. Glover, 63, Ga. 741.

Merchant's Bank v. Steamboat Co., 102 Md. 573.

General Electric Co. v. Southern Ry. 72 S. C. 251.

Union Pacific Ry. v. Jol Neb. 57.

J. M. & I. Ry. v. Irvin 180.

Grason County R. R. v. St. L. R. R. (Tex. 190 W. 1094.

Atlantic Coast Line Ry Dahlberg (Ala. 1910), 5

Ark. Southern Ry. v. Bank, 77 Ark. 482.

Harlow Trustee v. W. S. 26 I. C. C. 511.

It will be found from an tion of the authorities cit that an order-notify shipme tice to the railroad that th reserved in the consignor a carrier delivers to the consi out requiring the surrende bill of lading it does so at In Furman v. U. P. R. R. N. Y. 579, the shipper ma der-notify shipment from N to Denver, Colo. The deliv rier received no notice that an order-notify shipment, livered the same to the A draft was made upon th nee with the bill of lading which was not paid for, a upon suit was brought ag delivering carrier for a c The court held that it was of the delivering carrier tain the terms of the bill and when it had done so, have found that this was notify shipment. The cour 587:

"* * * It is argued even by the terms of the bill of lading, Zucca Brotl the consignees, and that b they were presumptively t parties to whom to make and that there was no writt

notification to the contrary, and hence defendants were justified in such delivery. We do not agree to the correctness of this construction of the bill of lading. It acknowledges the receipt of the goods, their weight, and states the amount of freight to their destination, Denver, Colo., and says the goods are marked 'Y—order, notify Zucca Bros.' Here is no statement that Zucca Brothers are the consignees. The very presence of the word notify, in its relation to them, shows they are not intended as the consignees. If they were, the word is wholly unnecessary. It is the duty of the carrier to notify the consignee of the arrival of the goods. Price v. Powell, 3 N. Y. 322. To place in the bill of lading a direction to notify certain persons to whom, if consignees, it was the carrier's duty to deliver, or at least to notify of the arrival of the goods, is a plain notice that (in the absence of further directions) they are not consignees. * * *"

To the same effect, see Farris v. B. & O. S. R. R. Co., 143 Ill. App. 208.

In Midland Valley R. R. Co. v. Fay & Egan Co. (Ark. 1909), 116 S. W. 1171, the court said, p. 1172:

"* * * As the machinery was shipped to the order of appellee, with the draft attached, the appellant had no authority to deliver it to the mill company, except upon the production of the bill of lading properly indorsed by the shipper. Arkansas Southern Ry. Co. v. German National Bank, 77 Ark. 482, 487, 92 S. W. 522. The delivery of the machinery without the payment of the draft, or the production of the bill of lading properly indorsed (the appellee not consenting), was a conversion by which the appellant became liable to appellee for the value of the machinery. Arkansas Southern Ry. Co. v. German National Bank, 77 Ark. 482, 92 S. W. 522. Jellett v. St. Paul, Minneapolis & Manitoba Ry. Co., 30 Minn. 265, 15 N. W. 237. The failure of appellee to endeavor to recover possession of the machinery did not relieve appellant of the liability; nor would it have been relieved if it had reclaimed the property and tendered it to appellee, but such tender could have been only in mitigation of damages. 3 Hutchinson on Carriers (3rd Edition), sec. 1374; Norman v. Rogers, 29 Ark. 365; Plummer v. Reeves, 83 Ark. 10, 13, 102 S. W. 376; 28 Am. & Eng. Ency. of Law (2nd Ed.) 683, and cases cited above. There was nothing shown in this case to bar the recovery of damages, if any. * * *"

To the same effect see:

The Union Stock Yards Co. v. Westcott, 47 Neb. 300.

Bank of Commerce v. Bissell, 72 N. Y. 615.

Joslyn v. G. T. R. R. Co., 51 Vt. 91.

Libby v. Ingles, 124 Mass. 503.

North v. The Transportation Co., 146 Mass. 315.

National Bank of Chester v. A. & C. A. L. R. R. Co., 25 S. C. 216.

Seaboard Airline Ry. v. Phillips (Md. 1908), 70 Atlantic 232.

Sometimes it is of considerable importance to solve the question whether placing the shipment on the side track of an order-notify consignee and permitting an inspection amounts to a conversion by the carrier, so as to make it chargeable for the entire value of the shipment. It is well settled that an unauthorized inspection does not render the carrier

liable for a conversion. In Dudley v. C. M. & St. P. Ry. Co., 58 W. Va. 604, 112 Am. St. Rep. 1027, the carrier permitted an unauthorized inspection because of which the goods were rejected. In this case the consignor made a shipment of apples under an order-notify bill of lading. The order-notify consignee was permitted to inspect without the production of the bill of lading and refused the shipment. The consignor was notified by the carrier of this refusal and then made claim against the initial carrier for the full value of the shipment. The delivering carrier then transported the goods to the nearest available market, sold them, deducted freight charges and tendered the balance to the shipper. The shipper refused to accept it and sued for the full amount. The court said, p. 1029:

"* * * The theory of his claim, then presented, afterward asserted by this suit, and now urged here, as one ground of error in the decree, is that the conduct of the defendant railway company amounted in law to a conversion of the apples to its own use. The argument to sustain this position treats the inspection allowed to Sharp's agent, as an authorized delivery of the property to him. That a common carrier is liable for a wrongful delivery, if in any way at fault, is perfectly clear. Such act may be treated as a conversion. Common carriers are bound to exercise the highest degree of care in this respect. No circumstances of fraud, imposition or mistakes will excuse the common carrier from responsibility for a delivery to the wrong person. Hutchinson on Carriers, sec. 344. To the same general effect, see North Pennsylvania R. R. Co. v. Commercial National Bank, 123 U
Sup. Ct. Rep. 266, 31 L. e
Indianapolis, etc. R. R. C
don, 81 Ill. 143, cited by
appellant. Of course th
rule, like all others, may
to some slight apparent
which need not be noticed
if there was no delivery,
law relied upon has no
The property was never
possession of the defen
sold, or removed for sale,
after the inspection. Sh
was simply permitted to
cars, set barrels out in
open them and examine
Then they were put back
and it was resealed by the
may be true that he had
do so, and that the def
wrong in permitting the
no evidence of title or rig
session having been show
a non sequitur to say,
facts there was a deliver
have been an authorized
minion over the property,
act was it? Clearly that
road company, for the pr
still in its actual and leg
It never parted with its
Not every wrongful act o
of a common carrier aut
action against it as for a
Where goods intrusted to
carrier are injured only t
remedy is for damages f
jury, not their value. Hut
Common Carriers, sec. 7
delay in delivery, the actio
for damages resulting, not
of the property: Hutch
Common Carriers, sec. 32
and Rankin v. Chesapeak
Co., 55 W. V. 181, 46 S. E.
is the nature of the pla

jury here? Inspection did not injure the property, so far as disclosed. It prevented the consummation of a sale to Sharp. Can that constitute the basis of an action for the value of the property? That it could not is so obvious that no such a claim is made, and this branch of the contention is founded upon the extremely fanciful theory of a technical delivery, for which no authority has been found.* * * "

It will be noticed that in this case the court did not decide what would be the measure of damages. It simply decided that the consignor could not recover the full value. In Schopp Fruit Co. v. M. P. R. R. Co., 115 Mo. App. 352, the consignor made an order-notify shipment of apples, allowing inspection. The goods were placed on the order-notify consignee's switch track, inspected by it and rejected. The consignor sued the carrier for a conversion and the court said:

"* * * The suit in conversion for the value of one hundred and eighty barrels of apples. To show a conversion it was incumbent on the plaintiff to prove that the apples were actually or constructively delivered to the Bonham Grocery Co. Plaintiff concedes this much. As a demurrer to the evidence was given, plaintiff invokes the settled rule of practice, that in determining whether or not plaintiff made out a prima facie case, every act and reasonable inference that the proof justifies must be taken as true. (Pauck v. St. Louis Beef & Provision Co., 159 Mo. 467, 61 S. W. 806; Duerst v. St. Louis Stamping Co., 163 Mo. 607, 63 S. W. 827; Baxter v. St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70; Ladd v. Williams, 104 Mo. App. 390, 79 S. W. 511). There is no positive or direct proof of the delivery of the apples to the Bonham Grocery Company. There are, however, two facts shown by the evidence from which plaintiff insists a delivery should be inferred; first, that the car was placed on a switch track along side of the grocery company's warehouse; and, second, that the grocery company took four barrels of apples from the car and delivered them to its customers on a order previously taken. The way bill and the bill of lading both contain a memorandum to notify the Bonham Wholesale Grocery Company of the arrival of the car and to allow inspection; thus clearly indicating that plaintiff expected the grocery company would handle the apples and granted it the privilege of inspecting them. The railroad company, therefore, by placing the car on a side-track near the grocery company's warehouse, simply followed the directions given it by plaintiff by placing the car as conveniently as possible to the grocery company's warehouse for the purposes of inspecting and unloading the apples, in the event the grocery company should conclude to take them, the railroad company retaining possession and control of the car, as the evidence clearly shows it did. No inference of delivery can be inferred from this proof.* * * "

It seems to be the trend of the authorities that where the consignee is a receiver of carload freight, and owns its own side-track, delivery is complete when the car is set for unloading at the usual and customary place for doing this on such side-track.

Lewis v. N. Y. O. & W. Ry. Co., 210 N. Y. 429.

Lyons v. N. Y. C. & H. R. R. Co., 119 N. Y. Supp. 703.

Moore on Carriers (2d Editions), vol. 1, page 241.

Anchor Mill Co. v. Burlington & Sioux Falls Ry. Co., 102 Ia. 262.

Chicago & etc. Ry. Co. v. Kelm, 121 Minn. 343.

In Lyons v. N. Y. C. & H. Ry. Co., 119 N. Y. Supp. 703, it was held that under an order-notify shipment it was not the duty of the carrier to place the car on the delivery track until the consignee was prepared, by the presentation of the bill of lading, to receive the contents of the car.

The general rule as to when delivery of a car load of freight is complete is well stated in C. M. St. P. Ry. Co. v. Kelm, 121 Minn. 343, where the court said:

" * * *Where a carrier transports bulky freight, in carload lots, to its destination, and, to enable the consignee to unload it conveniently, places the cars upon a track designated by the consignee for that purpose, or if he has made no such designation, upon a track proper for that purpose, and he has notice thereof, it is held by several courts that the carrier has performed the last act required by its duty to the consignee, that the delivery is complete, and that the carrier's liability as carrier has terminated.* * * "

To the same effect in addition to the authorities cited, see:

Pittsburg v. Nash, 43 Ind. 423.

Pindell v. St. Louis, 41 Mo. App. 84.

Cohan v. Missouri, 126 Mo. App. 244, 102 S. W. 1029.

Chicago v. Kendall, 72 Ill. App. 105.

Gregg v. Illinois, 147 Ill. 550, 35 N. E. 343, 37 Am. St. 238.

Paddock v. Toledo & O. C
Ohio C. D. 789.

Independence Mills v. B
72 Ia. 535, 34 N. W. 3
St. 258, and South v.
Ala. 167, 41 Am. Rep.

Arthur v. St. Paul & D.
Minn. 95; Riley v. Horn
ham, 127.

Nass v. C. R. I. & P. R
Minn. 84.

In the Anchor Mill Comp
Railway Company, 102 Ia.
court said, p. 265, concer
livery to a side-track:

" * * * What will consti
livery must of necessity de
circumstances. The railr
pany, in order to deliver t
in bulk certainly could n
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be required was that it pla
where it could be safely
veniently unloaded by the
titled to it, and notify hi
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dependence Mills Co. v. B
C. R. & N. Ry. Co., 72 Ia. 5
W. Rep. 320). In this ca
was put at the very plac
had requested, for the purp
ing unloaded, and the plai
notified of its action. W
could the railway company c
plete the delivery?' "

It is well settled that it i
of the consignee to unload
freight. There is no que
that the custom throughout
try is to place car load fr
unloading on the consign
track, and when this is
livery is considered compl
carrier. Bearing this in m
a review of the cases, the
authority seems to be that

erty shipped under an order-notify bill of lading, without surrender of the same, is a wrongful conversion of the property.[80] And under an order-notify bill of lading, the person to be notified but not named as consignee has not even the right to inspect

carrier places car load freight on the side-track, delivery is at once complete. The uniform "order" bill of lading contains near the top, on the first page, the following provision in heavy type:

"The surrender of this Original Order Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by shipper."

If the carrier placed the goods on the side-track and notified the consignee that the shipment was there for it, the carrier is liable as for a conversion, and the measure of damages would be the invoice price of shipment to the consignee at the time and place of shipment (under the old form of bill of lading.) If, however, it placed the goods on the side-track, and notified the consignee that it was there simply for inspection, then, if the bill of lading did not contain a provision to allow inspection, or the carrier otherwise authorized to permit it, the inspection would be unauthorized and the carrier liable for the damages resulting from the same. It would not be liable as for a conversion, but for the difference between the invoice price to the consignee at the time and place of shipment, as defined in sec. 3 of the old uniform bill of lading, if made thereunder, and the market value of the shipment at the time of rejection in the nearest available market.

80. L. S. & M. S. Ry. Co. v. W. H. McIntyre Co. (Ind. 1915), 108 N. E., 978, 981.

A bill of lading must be properly indorsed before the carrier is justified in making delivery. Killingsworth v. Norfolk & S. R. Co. (N. C. 1916), 87 S. E. 947.

A carrier of property which by the terms of the bill of lading is deliverable to the shipper's order is liable for its value to the true owner if he delivers it to the consignee or any one else without such order. Killingsworth v. Norfolk & S. R. Co. (N. C. 1916), 87 S. E. 947.

A bill of lading is regarded as the symbol of the property described therein, and its delivery by the holder and consignor to a bank with draft attached is equivalent to a delivery of the property so far as they are concerned. Vehicle Supply Co. v. McInturff (Ark. 1915), 179 S. W. 999.

The fact that a carrier was instructed to notify plaintiff of the arrival of goods gave plaintiff no right to require a delivery without the production and surrender of the bill of lading properly indorsed. Killingsworth v. Norfolk & S. R. Co. (N. C. 1916), 87 S. E. 947.

A stock buyer, who had been shipping hogs to commission merchants with instructions to sell them on commission, shipped hogs and received a "straight" bill of lading des-

the shipment without surrender of the bill of lading.[81] And when goods are shipped to the order of the consignor the carrier will not be justified in delivering them without such order by the fact that one of the employes of the shipper said the property was for a certain person.[82] So where a railroad wrongfully delivered an auto truck shipped under an order-notify bill of lading without first requiring the surrender of the bill of lading, the fact that the consignor sent men to repair parts on the truck, in an effort to induce the consignee to accept and pay for the same, did not release the carrier from the liability for conversion.[83] However, a shipper by correcting the address in an order-notify bill of lading after a steamer had sailed which compelled it to ship the goods by rail some three hundred miles from the port originally named to a port at which it did not touch, is a waiver of the conditions requiring the surrender of the bill of lading before delivering the goods.[84] Occasionally it may be difficult to ascertain just what person is entitled to take delivery of the goods at destination. Thus, goods are very frequently shipped under

ignating the commission merchants as consignees. He indorsed the bill of lading in blank and delivered it, with a draft on the commission merchants, to a bank, which discounted the draft. Before the draft was presented to the commission merchants, and before notice to the commission merchants of the transfer of the bill of lading the commission merchants received the hogs from the carrier and sold them. Held, that the sale of the hogs was not a tort, and did not render the commission merchants liable in trover to the bank, since, while the transfer of an "order" bill of lading may be deemed evidence of an intended pledge of the chattels described therein, as an assignment of the shipper's rights against the carrier, a straight bill of lading is not a true document of title, possession of which is symbolic of actual possession, and the carrier's possession is on behalf of the consignee, and though the consignor may transfer his interest in the shipment, neither he nor his transferee can disturb the effect of the straight bill of lading as against the carrier or the consignee without notice. C. E. White & Co. v. Century S. Bank of Des Moines, Ia., 229 Fed. 975.

81. L. S. & M. S. Ry. Co. v. W. H. McIntyre Co. (Ind. 1915), 108 N. E., 978, 981.

82. L. S. & M. S. Ry. Co. v. W. H. McIntyre Co. (Ind. 1915), 108 N. E., 978, 982.

83. L. S. & M. S. Ry. Co. v. W. H. McIntyre Co. (Ind. 1915), 108 N. E., 978, 982.

84. Miles Mfg. Co. v. North German Lloyd S. S. Co., 151 N. Y., Supp. 881.

order-notify bills of lading. Now, the "order-notify" person may, through some pretext or another, obtain possession of the goods, or the goods may be shipped under a bill of lading, care of a bank, and the consignee supposed to pay a draft before taking possession of the goods, but through connivance with the railroad agent or otherwise he gets the bill of lading, presents it and obtains possession of the goods. Sometimes he even obtains possession without the bill of lading. At common law the carrier who received goods billed to a named consignee was relieved from further liability by delivery to such consignee, unless the consignor stipulated otherwise in the bill of lading, or the carrier had otherwise notice that the consignee was not the owner. This rule rests upon the presumption that the title to the goods becomes vested in the consignee upon delivery to the carrier.[85] But a bill of lading is the written contract between the carrier and the shipper, and failure of the carrier to deliver live stock to the consignee at the place named in the bill of lading is a breach of such contract for which it must answer in damages.[86] Thus where goods were billed by a straight bill of lading, and the carrier had no notice of any arrangement between consignor and consignee, which could not be inferred from the face of the bill of lading, delivery to the consignee without production of the bill of lading was proper.[87] So where goods were consigned by a straight bill of lading to a symbol, consisting of certain letters, in care of a bank for the alleged consignee, the symbol, being admitted to be a fictitious designation, will be disregarded in the injury as to who was designated as consignee.[88] Although a third person, in whose name a package is addressed, is clothed with the right to receive the goods, it does not follow that such delivery is the only delivery relieving the carrier from liability.[89]

85. Lawrence v. Minturn, 58 U. S. (17 How.) 100, 15 L. Ed. 58; Southern Express Co. v. Dickson, 94 U. S. 549, 24 L. Ed. 285; Sweet v. Barney, 23 N. Y. 335; Pennsylvania R. R. v. Titus, 216 N. Y. 17, 109 N. E. 857; Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

86. Cincinnati, N. O. & T. P. Ry. Co. v. Luke (Ky. 1916), 186 S. W. 875.

87. Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

88. Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

89. Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

Where goods were consigned by a straight bill of lading in care of a bank for the alleged consignee, plaintiff having failed to guard himself against delivery before payment by using an order bill of lading, or notifying the carrier that the goods should not be delivered, except upon payment, the carrier is not bound to know the arrangements between consignor and consignee.[90] But the fact that goods were consigned on a straight bill of lading to a symbol in care of a bank for the alleged consignee, the symbol did not put the carrier upon inquiry as to an arrangement between consignor and consignee, as it would have in the case of an order bill of lading.[91] Therefore a delivery to the consignee named in a straight bill of lading, containing no notification of an agreement between the consignor and consignee, that a draft should be paid before possession was taken, relieves the carrier from liability.[92] Where a railroad company delivered cotton to a holder of a forged bill of lading, refusing to make delivery to a bank, the holder of the genuine bill of lading with drafts annexed, the company was guilty of conversion, rendering it liable to the bank for the value of the cotton.[93] An ambiguity in a contract for the shipment of live stock in designating the consignee, or in not clearly showing who he is, or the place of destination, should be construed most favorably to the shipper.[94] An express

In action against a carrier for misdelivery, grain being wrongfully delivered on the order of the consignee to a lumber company, the fact that the claimant made an attempt to collect from the consignee for its wrongful act in ordering a misdelivery to a lumber company did not absolve the carrier from its obligation, on the theory of ratification, as if one orders another to commit a wrong against a third party, each is liable, and an unsuccessful effort to hold one would not relieve the other. Kemper Mill Co. v. Missouri Pac. Ry. Co. (Mo. 1916), 186 S. W. 8.

In case of a misdelivery of goods, as where they are wrongfully delivered to a consignee without surrender of the bill of lading and payment of a draft, the shipper may abandon the shipment and hold the carrier for the price. Dyer v. Atlantic Coast Line R. Co. (Mo. 1916), 186 S. W. 529.

90. Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

91. Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

92. Mayer v. Southern Pac. Co., 159 N. Y. S. 93.

93. New York Cent. & H. R. R. Co. v. Bank of Holly Springs, 236 Fed. 562.

94. Cincinnati, N. O. & T. P. Ry. Co. v. Luke (Ky. 1916), 184 S. W. 1132.

company is liable where it delivers goods to the consignee without production of its receipts therefor, contrary to the shipper's directions to the company's agent, to whom they were delivered and who was told that they belonged to the shipper, and that drafts with the receipts attached would be drawn on the consignee for their price.[95] A bank which is the holder of unendorsed bills of lading for a shipment of cotton delivered to it as security for an advance is the legal owner of the shipments to which such bills of lading pertain and if the carrier wrongfully delivers such shipments to other persons holding fictitious bills of lading, it is liable to the bank for conversion, although the persons to whom it is delivered may have paid in good faith the value of such shipments to the original shipper.[96] So where one entitled to receive possession of property has, by the misfeasance or negligence of his own employes as to the safe-keeping of a "symbol of ownership," such as a freight bill, put it into the power of another to occupy his position ostensibly, and thereby enabled the other to gain a wrongful possession, the person whose employes are at fault is estopped from asserting his right against the one who by such fault has been induced to surrender possession.[97]

9. **Duty of Consignee to Accept.** As a general rule it is the duty of the consignee to receive goods consigned to it.[98] If, how-

95. Wells Fargo & Co. Express v. Pugh (Tex. 1916), 185 S. W. 61.

96. New York Cent. & H. R. R. Co. v. Bank of Holly Springs, 236 Fed. 562.

97. Hill Steamboat Line v. N. Y. C. & H. R. R. Co., 158 N. Y. S. 1084.

98. Wien v. N. Y. C. & H. R. R. Co., 152 N. Y., Supp. 154, 157.

The law places upon the consignee of goods damaged in transit the burden of receiving them if they are not wholly worthless, and handling them as best he can to minimize the damage; and, in a suit by a consignee against a carrier for damages to goods alleged to have been caused by the negligence of the carrier, it is entirely proper to allow the consignee to show what efforts he made to minimize the damage. Houston, E. & T. T. Ry. Co. v. Brackin (Tex. 1917), 191 S. W. 804, 806.

The consignee is obliged to accept goods when duly tendered by carrier, although damaged in transportation if not rendered totally valueless. Houston & T. C. Ry. Co. v. Iversen (Tex. 1917), 196 S. W. 908.

But where a carload of poultry reaches destination in a damaged condition, the consignee discharges its

ever, the property is so damaged as to be worthless, or materially injured, the consignee can refuse to accept. Of course a carrier is not liable either as carrier or as warehouseman for injuries to goods, no matter from what caused, after completion of its contract of carriage and complete delivery of the goods to the consignee, and an acceptance by him and subsequent assumption of full custody before the damage occurs.[99] In case of partial injury to a shipment, it is the consignee's duty to accept and rely on an action against the carrier for the damage, but where the goods are so materially damaged as to destroy their value, the consignee may refuse to accept and sue for full value.[100]

full duty to the railway when it sells the damaged goods for the best price that can be obtained for it. Gulf, Colo. & Santa Fe Ry. Co. v. Texas Packing Co., 37 Sup. Ct., 487, 489.

Where goods had been injured in transit, that consignee inspected the goods at their destination did not constitute an acceptance making a good delivery placing title in consignee, so as to require it to sue for their damage. Ithaca Roller Mills v. A. A. R. Co. (Mich. 1917), 163 N. W. 934.

But where injury to goods in transit does not render them worthless, even though the shipper wrongfully refuses to accept them, while under such circumstances he may not be entitled to recover their full value, he can certainly recover for the injury occasioned to them.

99. Veitch v. I. C. R. R. Co., (Ala. 1915), 68 So. 575, 576.

100. Beck v. Chicago, M. & St. P. Ry. Co. (S. Dak. 1917), 164 N. W. 74.

In Beck v. Chicago, M. & St. P. Ry. Co. (S. Dak. 1917), 164 N. W. 74, the court said:

"It seems to be generally, although not uniformly, held that in case of partial injury it is the duty of the consignee to accept the shipment and to rely upon an action against the carrier for the damage. Hutchinson, Carriers (3d Ed.) § 1365; Michie, Carriers, § 868; Moore, Carriers (2d Ed.) § 31; Parsons v. U. S. Exp. Co., 144 Iowa, 745 123 N. W. 776, 25 L. R. A. (N. S.) 842, and note. But there is a limitation to that rule, concisely stated in 10 Corp. Jur. 404, viz.:

"'Where the goods are so materially damaged as to destroy their value, the consignee may of course refuse to accept and sue for the full value, since in that event nothing that the consignee might do would lessen the loss and so diminish the carrier's liability.'"

In Beck v. Chicago, M. & St. P. Ry. Co. (S. Dak. 1917) 164 N. W. 74, the court continued, p. 75:

"It is urged by the defendant that as plaintiff's own witness testified that the potatoes were of some value, plaintiff could not lawfully abandon the shipment. It is a matter of common knowledge that while frozen potatoes have some value for the purpose of immediate consumption, they will not 'keep.' It must also be re-

10. Liability for Fire at Destination. A large number of claims have been filed against carriers for damage caused by fire to the goods while at destination. It is very obvious that if the carrier is liable as an insurer it is liable for loss incurred by fire, but if in reality it is only liable as a warehouseman, then, of course, the carrier is liable only in the event that the claimant affirmatively shows that it was negligent in causing the fire. [100½]

membered that potatoes at that season of the year were perishable property. St. L., etc., R. Co. v. Dreyfus, 37 Okl. 492, 122 Pac. 491, Ann. Cas. 1915C, 507. Under the facts as the jury must have found them, these potatoes were in such a damaged condition as to fully justify plaintiff in abandoning same. The case is analogous in principle of that of Brand v. Weir, 27 Misc. Rep. 212, 57 N. Y. Supp. 731, where, by delay in transit, a shipment of skirts was rejected because the season was over and the styles had changed and the consignee could make no use of them. No doubt there was still a value in them, but they were practically useless to the consignee. Likewise in the case of Wilkins v. Atlantic Coast Line Ry. Co., 160 N. C. 54, 75 S. E. 1090, the court sustained a judgment against the carrier for the full value of a shipment of syrup, that by reason of delay had become sour. No doubt the sour syrup had some value for the purposes of making vinegar, but it was of no value to the consignee. This case is to be distinguished from the case of a shipment of goods in boxes or barrels, one or more of which has become damaged, the others remaining intact, and also from the case of Parsons v. U. S. Exp. Co., supra, where certain parts of a machine, capable of being replaced, were broken in transit. Paraphrasing the language of Hackett v. Boston, etc., Ry. Co., 35 N. H. 390, the character of the property was, by the negligence of the carrier, so changed that it could not be applied to the ordinary uses of such property. The plaintiff therefore acted within his rights in abandoning the shipment."

It is a matter of common knowledge that, while frozen potatoes have some value for immediate consumption, they will not keep. Beck v. Chicago, M. & St. P. Ry. Co. (S. Dak. 1917), 164 N. W. 74.

If a carload of apples were not rendered practically worthless in transit, it was the consignee's duty to have accepted them on arrival at destination, and if his refusal to accept them was wrongful, he should suffer the loss incident to the further holding of the apples until they could be legally disposed of by the railway, but the consignee could still recover as damages the difference in the value of the apples in the condition in which they should have arrived, and their value in their condition at the time of arrival and tender by the road. Quanah, A. & P. Ry. Co. v. Novit (Tex. 1918), 199 S. W. 496.

In Quanah, A. & P. Ry. Co. v. Novit (Tex. 1918), 199 S. W. 496, the court said, p. 498:

"It is a correct proposition that if the apples were not practically worthless it was plaintiff's duty to have ac-

The Interstate Commerce Commission in prescribing form of bill of lading held that the bill of lading should rate a clause that the carrier was liable as a warehousem case of loss by fire, only after the expiration of the allowed by the tariffs on file for the delivery of the prope

cepted them upon arrival at Paducah, and if the refusal to accept the applies was wrongful, then the plaintiff should suffer the loss incident to the further holding of the apples until they could be legally disposed of by the railway company. St. L. & S. W. Ry. Co. v. Burrus M. & E. Co., 168 S. W. 1028; St. L. & S. W. Ry. Co. v. Cates, 15 Tex. Civ. App. 135, 38 S. W. 648; Railway Co. v. Merc. Co., 104 S. W. 1072; Baumbach v. G., C. & S. F. Ry. Co., 4 Tex. Civ. App. 650, 23 S. W. 693; G., C. & S. F. Ry. Co. v. Pitts, 37 Tex. Civ. App. 212, 83 S. W. 727; Corpus Juris, vol. 10, pp. 309, 404. But it would not necessarily follow that plaintiff could, in such event, recover nothing, as the suit is not for conversion strictly, but on allegations of negligence in transportation resulting in damage which plaintiff alleged rendered the apples wholly worthless. Under such allegations, if the proof should show that the apples were not practically worthless, plaintiff could still recover as damages the difference in the value of the apples in the condition at the time of their arrival and tender to the plaintiff."

100½. It has recently been held that a carrier is liable as an insurer for cotton, destroyed by fire at a compress point, while held there in transit, for the purpose of compression even though such compress point was selected by the shipper, and the carrier directed to have the cotton compressed at that place. D. Utassy v. So. Pac. Co., 161 N. Y

Not only may there be a fire to a shipment awaitin tation, but frequently the an injury while the ship the side-track at destinat case of this kind the ri covery is determined b there has been a delivery signee or not. So where has transported a car of the point designated by t has notified the consignee rival of the car, and given to unload the same, and th has broken the seal th locked the door with its and retained the key, and occurs in the car, and therein are thereby dest railroad company is not l Intire v. C. R. I. & P. 1915), 152 N. W. 305. whose relation to goods a of their destruction by fir a carrier, is liable as an safely carry and deliver. Bros. v. C. R. I. & P. Ry. 182 S. W. 120, but if its goods at the time of the tion by fire is that of war it is only liable for neglige eiger Bros. v. C. R. I. *Supra.*

See C. H. & S. A. Ry. teca Cia, etc., Co. (Tex. S. W. 1016; McClure v. (W. Va. 1919), 98 S. E. 5

Commission said (52 I. C. C., p. 695): "Section 1, Clause 3, Liability of Carrier as Insurer and Warehouseman for Loss, Damage, or Delay Caused by Fire.—Three proposals of the carriers which are contained in the proposed bill relate, in whole or in part, to warehousing and storage of goods; that is, to the distinctions in the degree of the carrier's liability and obligation as an insurer of the goods on the one hand, and that of a mere bailee or warehouseman on the other after the goods have arrived at destination and are still in its possession; or while they may be held in transit upon proper request of the shipper or owner. Indeed, it is upon this important question, i. e., the degree of character of the carrier's responsibility, that the greatest conflict of interest between the shipper and carrier occurs. The shippers earnestly oppose the carriers' proposals, which are related in principle and which at the present time constitute, and for some years past have constituted, conditions in the uniform and standard bills of lading. The proposals are found in section 1, clauses 3 and 4, and section 4, clause 1, of the proposed bill, and will be considered in the order in which they appear in the proposed bill. The first proposal, as expressed in section 1, clause 3, with respect to the carrier or party in possession of the property, is that 'for loss, damage, or delay caused by fire occurring after 48 hours (exclusive of Sundays and legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only.' At the conference between the shippers' and carriers' representatives the shippers objected to this provision and proposed in lieu thereof the following phraseology, to-wit: 'The liability of the carrier as a common carrier shall terminate at such time as is provided or determined by law.' Reduced to its simplest terms the question at issue here is: At what time in case of loss, damage, or injury caused by fire, shall the carrier's liability as an insurer of the goods transported by it be deemed to have ceased and its liability have been reduced to that of a warehouseman only? The answer involves some preliminary study of the carrier's liability in connection with its duty to transport and deliver. The common-law liability of the carrier attaches at the time of delivery to and acceptance by it of the goods for immediate transportation. I

Hutch. Carr. (3d Ed.), § 112. The duty to make delivery to t consignee of the goods transported is an essential part of the c rier's obligation whether expressed in the contract or not. T question when its liability as a carrier terminates and that warehouseman begins is an exceptionally important one and p sents many delicate phases. A valid delivery involves, accordi to the authorities, four requisites, viz: Delivery, (1) to t right person, (2) at a reasonable time, (3) at the proper pla and (4) in a proper manner. 2 Hutch. Carr. (3d Ed.) § § 662-6 The bills of lading act contains no provision respecting transiti from liability of a common carrier to that of a warehousem Questions of this nature arising in connection with interst shipments moving under bills of lading issued pursuant to the to regulate commerce are necessarily federal questions and question as to responsibility under the bill of lading is none less a federal one because it must be resolved by the applica of general principles of the common law. Southern Ry. v. P cott, 240 U. S., 632, citing Adams Express Co. v. Cronin supra. In this country there is no uniformly accepted rule de minative of the question as to when the carrier's extraordi liability ceases and that of a mere warehouseman is substitu except in the case of carriers by water. The rule as to the la is that after arrival of the goods the carrier must give the c signee actual, not constructive, notice of such arrival, and give him a reasonable time within which to remove the goc What constitutes a reasonable time for the removal of the go is a question of fact, to be determined by the particular circu stances of the case. In respect of rail carriers three differ rules have been evolved, familiarly known as the Massachuse New Hampshire, and New York rules. The latter, which h been adopted and applied in a number of states, is sometim referred to as the Michigan rule. Under the Massachusetts r the liability of the carrier as an insurer of the goods ends wh the goods have arrived at their destination and, even with notice to the consignee, have been safely deposited upon platform or in the warehouse of the terminal carrier. 2 Hut Carr. (3d Ed.), § 701, citing Norway Plains Co. v. R. R. Co Gray, 263. Under the New Hampshire rule carrier's liabi ends when the goods have arrived at destination and a reaso

ble time during which they might have been removed by the consignee has elapsed. Under neither the Massachusetts nor New Hampshire rule is actual notice required. 2 Hutch. Carr. (3d Ed.), § 704, citing Moses v. The Railroad, 32 N. H., 523. By the New York rule, if the consignee is present upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time in which to remove them. If, after a bona fide effort to give notice of the arrival of the goods to the consignee named, such consignee does not appear and remove them within a reasonable time, he can not hold the carrier longer as an insurer. If he is absent, unknown, or can not be found, the carrier may store them. 2 Hutch. Carr. (3d Ed.), § 708, citing Fenner v. Railroad, 44 N. Y., 505, and other cases. The New York rule is also the law of England and of Canada. Mitchell v. The Railway Co., 10 L. R. Q. B., 256; Chapman v. Great Western Ry. Co., 5 Q. B. D., 278; Richardson v. Canadian Pacific R. Co., 19 Ont. R., 369. It is, in effect, the same as that applicable to water carriers. Its distinctive feature is the requirement of actual notice to the party entitled thereto of the arrival of the goods, unless, after diligent effort so to do, the carrier, because of the death of the consignee, or of inability to learn his address, is unable to serve him with notice. The New York rule is obviously the more just one, since, under all the varying conditions of rail transportation of today, it is as impracticable for the consignee to anticipate the day and hour of arrival of trains, or the probable time of replacement of cars, or tender of delivery, as it was for the consignee of goods transported by water to anticipate the time of arrival of the ship bearing his goods. The carriers contend: (1) That the common-law rule upon the question of the difference in liability with respect to carrier and warehouseman has not been abridged or in any way affected by federal legislation; (2) that the rule proposed does not offend against either public policy or the interstate commerce act; (3) that the length of time given after notice more than meets the common-law rule of reasonableness; (4) that the definite form of the wording meets the requirement that the privilege be clearly specified; (5) that the shippers' pro-

posal puts the question of liability back in the same s
that existed prior to the passage of the Carmack amendm
invokes the same uncertainty and lack of uniformity wh
Carmack amendment was especially designed to avoid; a
that the act gives the Commission no power to impose up
riers a heavier liability than may be found in the stat
under the common law. The shippers' opposition to the c
proposal is predicated upon the following grounds,
(1) That a rule terminating the carrier's liability after 4
after the giving or sending of notice of arrival at dest
would inevitably result in many instances of injustice; (
the provision would terminate the carrier's liability as s
the giving of notice even though, in the case of a carloa
ment, the car were not placed and might not be placed fo
ery within 48 hours after the giving or sending of notic
rival; and (3) that in case of some commodities the fr
under demurrage regulations for the unloading of carloa
ments is more than 48 hours and that, therefore, the c
liability ought to extend through the time during which it
gated, under tariff provisions, to hold the car for unloading
shipper free of demurrage. Upon broader grounds, more
ularly in connection, with the proposed provision design
section 4, clause 1, infra, but upon grounds which it will b
as appropriate to discuss here, the shippers contend agai
limitation of the carrier's liability. It is urged upon b
behalf of one group of shippers that 'any service perfor
the carrier is "transportation" and that the liability of t
rier is that of a common carrier throughout the time th
erty is the subject of transportation as defined in the first
of the act to regulate commerce.' * * * 'That since s
and delivery are a part of transportation the carrier m
liable throughout the course of the property (transportatic
a common carrier. The act to regulate commerce deal
with common carriers. The Commission should not perr
carrier to limit its liability to negligence, only, while prop
in storage.' In behalf of another group of shippers it is
(1) that property in possession of the carrier does not
what can properly be termed a warehouse service; that t
rier can not leave the goods in the car, no matter how lo

time, and claim warehouseman liability; that the warehouseman service must be actually given after the reasonable time for removal has expired; that when goods arrive at destination and are held in a vessel, car, depot, or place of delivery they are still receiving transportation service; (2) that such a holding of property is a part of the service that must be rendered in connection with the delivery, and is performed by the carrier as a common-carrier service; (3) that to restrict the carrier's liability to that of a warehouseman, only, when it does not render such a service would deprive the shipper of the benefit of the liability which the character of the service requires and would be a penalty of unnecessary and unreasonable severity for the failure to remove property at the expiration of 48 hours, failure for which the demurrage rules already provide a sufficient penalty; (4) that until the property is received or until such time as it should reasonably be removed, the shipper is entitled to demand that the carrier shall exercise the same diligence and be responsible to the same extent for property in its possession. (5) It is not claimed that the carrier should be held to the liability of a common carrier for goods in its possession awaiting delivery indefinitely. The shippers express no opinion as to what would be a reasonable time during which the carrier might be required to continue its high degree of liability, but say merely that the law now prescribes that at the lapse of a reasonable time for the removal of the goods the carrier's responsibility as a common carrier ceases and it becomes liable as a warehouseman only; that what constitutes a reasonable time must be determined from all the circumstances and conditions affecting each particular shipment; that it is impossible to fix an arbitrary time to take the place of the reasonable time prescribed by law without resulting in many cases of individual hardship. These arguments are apparently based upon a construction of the terminology of section 1 of the act to regulate commerce and of two decisions of the Supreme Court of the United States touching the carrier's liability in respect of goods remaining in its custody after arrival. In Cleveland & St. Louis Ry v. Dettlebach, 239 U. S., 588, the question, as stated by the court, was, 'Whether the limitation of liability (under which a shipment of household goods had been received and transported) may be deemed to have spent its force upon

the completion of the carrier's service as such, or must be he to control, also, during the ensuing relation of warehousema The lower court had held to the contrary, reasoning that t limitation of the amount of the carrier's liability provided for the bill of lading inured only to the benefit of the carrier as su and that the consideration of a reduced rate which supported t transportation contract could not be carried over so as to oper as a limitation of the amount of the carrier's liability in its cap ity of warehouseman, but the Supreme Court ruled that the sh ment having been made under an express contract made for t purpose of interstate transportation, such a contract must determined in the light of the act to regulate commerce. D cussing the language of section 1 of the act the court held th the term 'transportation' included all services of the carrier connection with the shipment, including storage of goods aft arrival at destination. The court said: 'From this and oth provisions of the Hepburn act it is evident that Congress recc nized that the duty of carriers to the public included the p formance of a variety of services that, according to the theory the common law, were separable from the carrier's service carrier, and, in order to prevent overcharges and discriminatio from being made under the pretext of performing such additior services, it enacted that so far as interstate carriers by rail we concerned the entire body of such services should be includ together under the term "transportation" and subjected to t provisions of the act respecting reasonable rates and the lik The court's decision related only to the question indicated, v whether the limitation of the amount of liability provided in the bill of lading had 'spent its force upon the completion the carrier's service as such, or must be held to control, also, d ing the ensuing relation of warehouseman.' The decision has bearing upon the question as to when, or under what circu stances, the liability of the carrier, as such, ceases and that warehouseman begins. Shortly after this decision was render the case of the Southern Ry. v. Prescott, supra, came before t Supreme Court on error to the supreme court of the state South Carolina. That case involved the liability of the carri of an interstate shipment as warehouseman of the goods aft their arrival at destination. One of the stipulations of the b

of lading, substantially the same as that which we are here considering, was that 'property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of arrival' might be kept in car, depot, or warehouse, 'subject to reasonable charge for storage and carrier's liability as warehouseman only.' After arrival of the goods the consignee paid the entire freight charges and took away four of the 13 packages constituting the shipment. The company's agent consented that nine packages might remain to meet the consignee's convenience in removal. Before they were called for, the carrier's warehouse, with its contents, including the nine undelivered packages, was destroyed by fire. The Supreme Court held that 'transportation' as defined in the act includes the service of the carrier as warehouseman and that the retention of the part of the shipment in question was a terminal service forming part of the transportation service in the sense of, and governed by, the act to regulate commerce and that the carrier was liable for negligence only. The duties of the carrier and the shipper in respect to the delivery of goods are reciprocal. The circumstances and conditions attending the delivery of freight at terminals in the large cities, and even from the depots of carriers in the smaller communities, are such that it is not only impossible for the shipper to anticipate the arrival of his goods and be there to receive them, but also it would be equally disadvantageous to the carriers, whose facilities for the receiving and handling of freight are so congested and inadequate in many communities that much time and thought on the part of transportation companies, public commissions, and regulatory bodies are being devoted to the solution or amelioration of such conditions. The common-law rule varies in this country, as we have seen, there being three different applications, each in different jurisdictions. It might be argued, therefore, that any order issued by this Commission would have the effect of changing the rule in one or more of these jurisdictions and would be beyond the authority of this Commission as being an attempted exercise of legislative functions not specifically delegated to it by Congress. We think no such question of our jurisdiction could be seriously raised upon the ground stated. Though perhaps mixed with the question of the common-law rule it is primarily an administrative

question. What we are really dealing with are certain r
regulations, and practices of the carriers, viz., those upon v
the question of the termination of the carrier's liability as
would cease under the law and its liability as a warehous
would begin. The primary question is one of fact and as a
ministrative matter it is both desirable and proper, in order
unnecessary controversy may be avoided· that a reasonable
should be adopted for the determination of this question.
practical matter, it is not only essential that the shipper sh
have notice of the arrival of his goods, but that the carrier sh
place them in an accessible position to be received by him
removed. Until they are so placed and tendered for delivery
obviously impossible for the consignee to receive and re
them and the carrier can not reasonably be relieved of its
mon-law liability until it has so placed or tendered the good
delivery. If the consignee, or other party upon whom is the
to receive the goods, does not remove them within a reasor
time thereafter, the carrier's common-law liability should c
and become that of a warehouseman only. The consignee sh
have a reasonable time within which to remove the goods
notice has been duly received or given that they are ready
delivery, and the carrier's notice to the shipper should be
which not only notifies him of the arrival of the goods, but
that they are ready for delivery, or that, in the case of a ca
shipment, the car has been placed at a designated place fo
livery, or that the carrier awaits orders respecting its place
or delivery. This, in substance, is the common law and th
tablished practice of the carriers even in those jurisdic
where, under the strict application of the Massachusetts and
Hampshire rules· they might not be required to give notic
is not the question of notice, as such, in this clause with v
we are here concerned, for the carriers' proposal include
giving of notice. The question is of the propriety and rea
bleness of the proposal to reduce the high degree of carrier l
ity to that of a warehouseman; that is to say, to liability for
ligence only, for loss or damage caused by fire after 48 h
(exclusive of Sundays and legal holidays) after notice has
sent or given. There can be no reasonable division, as bet
the carrier and the shipper, of the carrier's liability for the g

while they are in its custody and until it has fulfilled its duty of delivery or, by reason of the consignee's neglect or failure, has, after reasonable efforts so to do, been unable to make the delivery. It follows therefore there is a conflict between the provisions of the bill of lading limiting the free time to 48 hours after tender of delivery or notice that the shipment is ready for delivery, if the tariffs applicable give the shipper a longer time within which to remove the goods before demurrage or storage begins. The consignee is within his legal rights if he avails himself of the full time allowed by the tariffs and the carrier can not be presumed to be released from its liability, as such, while the goods are continued in its custody and the shipper, in accordance with privileges specifically accorded under duly published and filed tariffs, incurs no penalties. We find that the provision in the proposed uniform bill of lading is open to the objection made by some of the shippers, to-wit, that it makes the carrier's liability dependent upon the sending or giving of notice of arrival, and not upon a delivery, or tender of delivery. We think this objection should be removed, and that the clause should be amplified and changed to read as follows: 'The carrier's liability shall be that of warehouseman only, for loss, damage or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be counted as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of property upon consignee's order, has beeen made.'"

11. **Right to Sell.** The carrier, of course, has a right to sell goods after complying strictly with the statutes of the state in which the sale is made.[100½] Where fruit, consigned to a shipper, another to be notified, is rejected by the notified party, the carrier is liable in conversion if it sells the fruit without notifying

100½. A carrier has a right, reasonably, and in compliance with statutory provisions, when any are applicable, to sell a shipment when the consignee fails to accept it. L. Kommel & Son v. Champlain Transp. Co. (Vt. 1918), 105 Atl. 253, 254; Emery & Co. v. Chicago, B. & Q. R. Co. (Ia. 1918), 170 N. W. 540.

the consignor, unless the fruit is so far decayed that there is not time to do so, or for some other reason it is impracticable, notice to the "notify party" not being sufficient, under the state statute.[101] When freight is rejected by the consignee or the freight charges not paid, the carrier has the right to sell the goods for charges, if the shipper does not take immediate action to protect them. In selling the property, however, the carrier must proceed strictly according to the statute of the state in which the sale is held. Any deviation from the statute makes the selling void and renders the carrier liable for conversion. So if a railroad company which holds a sale of unclaimed freight fails strictly to comply with the state statute by giving notice of the time and place of the sale to the owner, consignee or consignor, it is liable for the value of the property at the time and place of conversion.[102] Where a carload of fruit shipped from Chicago

101. Brockman Com. Co.v. Mo. Pac. Ry. (Mo. 1916), 188 S. W. 920.

A commission merchant shipped peaches from Malvern, Ark., to St. Louis, Mo., with draft attached to bill of lading. The consignee refused the shipment after inspecting it and the railroad, notifying the consignee, but not the shipper, turned the peaches over to another commission house, which sold them within an hour thereafter. The court held the carrier was liable to the shipper for conversion for not notifying it of the sale and was liable under section 3 of the uniform bill of lading for the full invoice value of the consignment at the time and place of shipment. F. W. Brockman Commission Co. v. Mo. Pac. Ry. Co. (Mo. 1916), 188 S. W. 920.

In the absence of interfering regulations by Congress or the Interstate Commerce Commission, Revisal 1905, § 2637, as to sale by a carrier for freight and storage charges of unclaimed, nonperishable freight, prevails as to interstate shipments. Norfolk & S. R. Co. v. New Bern Iron Works & Supply Co. (N. C. 1916), 90 S. E. R. 149.

Under Revisal 1905, § 2637, providing that a carrier, having unclaimed nonperishable freight in its possession for six months, may, on notice, sell it for freight and storage charges, it need not sell sooner, though the consignee immediately refuses to take the goods, but cannot collect storage charges for a longer time, though delaying sale. Norfolk & S. R. Co. v. New Bern Iron Works & Supply Co. (N. C. 1916), 90 S. R. 149.

102. Horton v. Tonopah & Goldfield R. Co., 225 Fed. 406, 409.

Vernon's Sayles' Ann. Civ. St. 1914, art. 725, authorizing a carrier to sell unclaimed freight "offering each box, bale * * * or other article separately as consigned" requires the carrier to offer each box or bale or other article separately unless the freight is consigned in

to New York was seized under a replevin writ on November 1st, order for its sale as highly perishable obtained on November 2nd, and sold on November 3rd, but notice to consignee not given until November 4th, the carrier is liable to the consignee for the value of the shipment and is not relieved by having turned the proceeds over to the third person who sued out the replevin writ or by the cancellation of the replevin bond.[103] A railroad company which has a relative of one of its employes secretly act for it as an agent to bid in unclaimed freight at a sale not held in strict compliance with a statute of the state in which the sale is held is guilty of conversion.[104] Since no valid sale of undelivered freight can be made by a carrier unless the statutory method is strictly pursued, the burden is on the carrier to show that the sale was regularly conducted.[105] Therefore a carrier which has sold lumber for freight and demurrage charges in strict compliance with the state statute regulating the sale of unclaimed freight is not liable for conversion.[106]

12. **Warehousing.** While the carrier's liability as a warehouseman will be discussed more in detail in another place, it might not be out of place to here refer to a few general rules. The carrier's liability as a warehouseman begins when its liability as a carrier ends. The general rule, well settled, is that the common-law liability of the carrier ends when the goods reach their destination and the consignee has had a reasonable time after

bulk, in which event the sale must be in bulk, and where fertilizer is shipped in bags, each weighing a specified number of pounds, and described in the bill of lading as a specified number of "bags complete fertilizer, weight 26,000 pounds," the carrier selling the same as unclaimed freight cannot sell the same in bulk, but must offer each bag separately; the word "bulk" having reference in law to merchandise which is neither counted, weighed, nor measured, and the words "as consigned" having no other meaning than that the articles to be sold shall be sold in the manner in which consigned as evidenced by the bill of lading. Texas & P. Ry. Co. v. Gate City Fertilizer Co. (Tex. 1915), 176 S W. 868.

103. Martorana v. Baltimore & Ohio R. Co. (N. Y. 1915), 151 N. Y., Supp. 841.

104. Horton v. Tonopah & Goldfield R. Co., 225 Fed. 406, 409.

105. Horton v. Tonopah & Goldfield R. Co., 225 Federal Reporter, 406, 407.

106. Horton v. Tonopah & Goldfield R. Co., 225 Federal Reporter, 406, 407.

notice to accept them, and fails to do so, or refuses to them, and thereupon the liability of the carrier as a ware man commences and no duty devolves upon the carrier, as ter of law, to notify the consignor, at least where the cor appears presumptively to be the owner, of the refusal of tl signee to accept the goods, unless in the circumstances particular case reasonable care requires it.[107] The liabili

107. Weed v. Barney, 45 N. Y., 344, 6 Am. Rep. 96; Bacharach v. Lehigh Valley Ry., 143 App. Div. 117, 127 N. Y. Supp., 607; Manhattan Shoe Co. v. C. B. & Q. R. R. Co., 9 App. Div. 172, 41 N. Y. Supp. 83; Fenner v. Buffalo & St. L. R. R. Co., 44 N. Y. 505, 4 Am. Rep. 709. Wein v. N. Y. C. & H. R. R. Co., 152 N. Y. Supp. 154, 156.

The parties to an interstate shipment may not, by special agreement, alter the conditions specified in the bill of lading governing the carrier's liability when a shipment is not removed within forty-eight hours after notice to the consignee of its arrival, which conform to the carrier's published regulations. Southern R. Co. v. Prescott, 36 Sup. Ct. 469, 240 U. S. 632; 60 L. Ed.—

The liability of a carrier as a warehouseman is based on negligence, and it is not an insurer of the goods. Chicago, R. I. & P. Ry. Co. v. Stouffer (Ind. 1916), 111 N. E. 809.

Where an express company offers to make delivery at the consignee's place of business, and the consignee declines for reasons of his own convenience, the company's liability as a common carrier then terminates, and the consignee has no power to prolong such liability, however inconvenient it may be for him to receive the goods. Southern Express Co. v. Potter Bros. (Tenn. 1916), 18 157.

Where an express company to make prompt delivery of signment of goods, and its as carrier was determined by signee's request that they be the station platform for l venience, and the company, tect them from trespassers, i in the station, its liability v that of a warehousema where the station was burn out his fault, it was not liabl value of the goods. South press Co. v. Potter Bros. 1916), 183 S. W. 157.

A carrier of bananas, ind of the contract of shipment, c owner the duty to preserve tl erty after it reached destinati it was delivered. Illinois Cen v. Freeman (Tex. 1916), 18 369.

A transferman's duty as ends with delivery of the g trusted to him at the place c nation. If, for any reason, h there relieved of their act tody or possession within a able time, he is under a d further, and less exacting provide for their safety, for reasonable period of time, th of which duty is determined principles of law applicable t housemen. Brown Shoe Co.

(W. Va. 1916), 87 S. E. 1014.

ter arrival of the goods at destion and after a reasonable length me has elapsed in which the conee is to remove them, the liability ie carrier is changed from that of insurer to that of a warehouse-

Now, a carrier in charge of ment as a warehouseman, is only ier the duty to exercise the care ich an ordinarily prudent person uld exercise with reference to the perty, under the circumstances. almers v. N. Y. C. R. R., 161 N. S. 577. In an action against a rrier for negligence in placing a r containing interstate freight, for hich it was responsible only as arehouseman in a place where it as liable to be submerged in preailing high water, the burden was on he claimant to establish the carier's negligence. Chalmers v. N. Y. R. R. Co., 161 N. Y. S. 577. Where carrier notified the consignee of the rrival of the car of interstate freight nd required its removal within 48 ours, and the consignee, after paying freight and draft, removed a portion of it from the car, which had been placed on the usual delivery track, upon the destruction of the remainder of the freight by flood 10 days later, the carrier's only liability was for negligence as warehouseman. Chalmers v. N. Y. C. R. R. Co., 161 N. Y. S. 577. In these cases the difference in the requirements of proof, from what they are if an action is brought against the carrier as an insurer, should be noted. In the latter case, all that is necessary to show is the delivery of the shipment to the carrier in good condition and either its non-delivery or its delivery in a damaged condition. Where it is sought to hold the carrier as a warehouseman, however, something more must be shown. There must be some affirmative act of negligence shown, on the part of the carrier, or else the circumstances must be such as to raise a presumption of negligence. For instance, if a shipment is destroyed by a flood while at destination, in possession of the carrier, the mere fact that there was a flood would naturally not bind the carrier for negligence, but, if it was shown that the flood was slowly rising, that the carrier had three or four days' notice before the apex of the flood was reached, that the shipper requested the carrier to remove the shipment, then, in such a case, the carrier would be held negligent and its responsibility as a warehoueseman absolute. Supposing freight is stored in a depot. The mere fact that the depot burned probably would not render the carrier liable for negligence, but if it was shown that it permitted persons to throw lighted matches on the premises and exercised no precautions against fire, then a situation is developed where a presumption of negligence can exist and the carrier held responsible Where a delivering carrier stored merchandise on its own wharf to await the arrival of a vessel of a certain line to complete the transportation to a certain foreign port, its liability is that of a warehouseman, especially under a bill of lading stipulating that the contract for inland transportation should terminate on the delivery of the merchandise at said wharf. Coate Bros. v. New Orleans Terminal Co. (La. 1916), 72 So. R. 687. Where the merchandise so stored, consisting of cotton seed cake, a perishable commodity, was placed under a shed with a leaky

roof, open sides, and a wet floor, and only a portion of the goods was covered with tarpaulins, and in consequence the cake, or most of it, was damaged by mold and mildew, held, that the carrier was negligent in storing the goods in an unsafe and unsuitable place. Coate Bros. v. New Orleans Terminal Co. (La. 1916), 72 Co. R. 687. It was further held that under such circumstances, fogs, rain, and high waters, furnish no excuse, as they did not prevent the carrier from storing the goods in a warehouse or other dry place. Coate Bros. v. New Orleans Terminal Co. (La. 1916), 72 So. R. 687.

Notwithstanding the relaxation of the high duty of the carrier effected by termination of carriage and deposit of the property at the place of destination, it still remained under duty to keep it at that point for actual delivery into the hands of the owner, or his agent, upon application therefor. If goods are not called for on arrival, it is the duty of the carrier to store them until called for, or until they are sold, in conformity with law, for satisfaction of its charges. Belknap v. Baltimore & O. R. Co. (W. Va. 1917), 910 S. E. 656, 658.

Where a consignee refused shipment of maize, railway company was not required to store same at place of destination, but was justified in removing it to the most convenient and suitable storage provided it held itself ready to deliver on demand. Texas, N. O. Ry. Co. v. Patterson & Roberts (Tex. 1917), 192 S. W. 585.

Where a consigenee has failed to use due diligence to remove goods after notice of their arrival at destination, the carrier's liability thereafter is that of a warehouseman. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411.

So where the claimant shipped goods which arrived on the 27th of March and on April 4th received notice of their arrival and on April 5th the goods were destroyed by fire in the warehouse in which they had been held since arrival, Held that the liability of the carrier was that of a warehouseman and in the absence of affirmative proof that it was guilty of negligence, claimant could not recover. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411.

A warehouseman is liable for loss by fire occasioned by his negligence or the negligence of his employes. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411.

Where goods in a warehouse are destroyed by fire, the burden of showing negligence is on the bailor, and is not presumed from occurrence of fire. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411.

After the goods have reached their original destination the undertaking of the carrier so far as transportation is concerned is at an end, and any new obligation on its part to deliver at a different point must arise out of a new and different contract. Fred Henderson & Walters v. A. C. L. Ry. Co. (Ala. 1917), 78 So. 309.

This new undertaking places upon the carrier the liability of a warehouseman.

Under the rule of the federal courts, a warehouseman is liable only for negligence, the burden of proving which rests on the party alleging it, and is not shifted by proof merely of loss or destruction of property in charge of the warehouseman. United Metals Selling Co. v. Pryor, 243 Fed. 91.

Claimant brought suit for the value of certain copper ingots, pilfered from a car on the tracks of the Wabash R. R. at St. Louis. After the car had arrived, notice of arrival was sent to the claimant and the bill of lading had a provision that property not removed within forty-eight hours after notice of arrival had been sent would be held by the carrier as warehouseman only. Possession of the car was not taken by the claimant until after forty-eight hours elapsed and the carrier contended that it was not liable for pilferage. In holding the carrier's liability that of a warehouseman, the court said, United Metals Selling o. v. Pryor, 243 Fed. 91:

"The bill of lading in this case, in accordance with the provisions of the act, provides that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, among which is the express condition (as appears in the stipulated facts) that the responsibility of the Wabash Railroad Company shall be that of warehouseman only for the property, if not removed by the consignee from its tracks within the 48-hour period for unloading, after notice of the arrival of the car, in which the copper was shipped, in its yard at St. Louis. Under the recent decision of the Supreme Court in Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836, it must be held that the liability of the Wabash Railroad Company in this case, under the agreed facts, was that of warehouseman only.

The appellant next complains of the decree because it did not adjudge the Wabash Company liable (under the facts stipulated) as a warehouseman. This complaint might well be dismissed, for the reason that appellant seeks to recover from the railroad company upon the ground alone of its liability as a common carrier, and there is no claim or sufficient proof that it has incurred any liability as a warehouseman. True, the intervener's petition asks for such other and further relief as may be just; and the answer alleges that under the facts the liability of the Wabash Company, if any, is that of a warehouseman only. But that is not sufficent to enable the appellant to recover in the absence of proof by it of the negligence it charges against the railroad company whereby the copper was lost from the car. The appellant, however, maintains in argument that, having shown the loss of the copper from the car (or other grounds from which it might be inferred that it was stolen from the car), a prima facie case of negligence is shown against the defendant, and that the burden then shifts to it to show its freedom from negligence, and cases from certain of the state courts, including Missouri, are cited in support of this contention. But an equal or greater number of decisions from the courts of other states may be cited to the contrary. But this question is hardly open to debate in this court, for in the case of Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836, above, it is directly held that the rule of the Supreme Court of the United States itself is, under the act to regulate commerce, opposed to the contention of the appellant. In that case the same contention was made by the appellee as is made by the appellant here, and the Supreme Court said:

"'Viewing the contract set forth in

ading [in that case] as
, the measure of liability
ast also be regarded as a
estion. As it has often
the statutory provisions
he intent of Congress that
ation of the carrier with re-
the services within the pur-
the statute (the act to regu-
nmerce) shall be governed by
n rule in the place of the di-
requirements of state legisla-
and decisions [citing many
]. And the question as to the
onsibility under the bill of lading
one the less a federal one because
must be resolved by the applica-
n of general principles of the com-
on law. * * * It was explicitly
rovided that in case the property
was not removed within the specified
time it should be kept subject to lia-
bility "as warehouseman only." The
railway company was therefore liable
only in case of negligence. The
plaintiff, asserting neglect, had the
burden of establishing it. This bur-
den did not shift. As it is the duty
of the warehouseman to deliver upon
proper demand, his failure to do so,
without excuse, has been regarded as
making a prima facie case of negli-
gence. If, however, it appears that
the loss is due to fire, that fact in
itself, in the absence of circumstanc-
es permitting the inference of lack
of reasonable precautions, does not
suffice to show neglect, and the plain-
tiff having the affirmative of the issue
must go forward with the evidence
[citing a number of cases]. * * *
It is undisputed that the loss was
due to fire which destroyed the com-
pany's warehouse with its contents,
including the property in question.
The fire occurred in the early morn-
ing, when the depot and warehouse

were closed. The cause of th
did not appear, and there wa
ing in the circumstances to
neglect on the part of the
company. The trial court d
motion [of the railway com
a direction of a verdict an
the jury 'the burden of sh
there was no negligence is
fendant.' Applying the
lished by the state dec
the Supreme Court of th
ruled the defendant's
sustained the judg
It has been recognize
court, as was said in
Case, supra [Fleischr
R. Co., 76 S. C. 237
L. R. A. (N. S.) 5
it applies is a "som
rule" to which the
withstanding the g
posing authorities
tions." * * *
have stated, we
gation of the
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that, in this
the plaintiff in
"The judg
Clark v. Bar
13 L. Ed. 98
10 Wall. 17
v. Wilson
firming (
miralty);
17 Fed.
Camden
271, 7 A
way C
35 Am
R. C
South
and
"
or
of,

any respect; and the inference that the seal was broken and the copper stolen from the car was not sufficient to warrant a finding that the copper was lost because of any neglect or want of ordinary care upon the part of the railroad company as warehouseman."

Under the uniform bill of lading containing a stipulation that property not removed by the party entitled to receive it within forty-eight hours after notice of arrival has been duly sent or given shall be kept in custody as a warehouseman only if consignee fails to so remove it. After the expiration of that time the carrier does not hold the property as an insurer, but only as a warehouseman. United Metals Selling Co. v. Pryor, 243 Fed. 91, 97.

Ordinarily a carrier's liability for injury to a shipment will cease when the goods are refused by the consignee, although damaged, unless the carrier has extended its liability by an act such as retaining possession and having the goods repaired. Houston & T. C. R. Co. v. Iversen (Tex. 1917), 196 S. W. 908.

Where a carrier had repaired an automobile injured in shipment, and the consignee then refused to accept it, the company thereafter held it only as warehouseman. Houston & T. C. Ry. Co. v. Iversen (Tex. 1917), 196 S. W. 908.

In Barber v. D. G. H. & M. Ry. Co. (Mich. 1917), 164 N. W. 377, the court said, p. 379:

"The case of the United Fruit Co. v. New York & Baltimore Transportation Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240, 10 Ann. Cas. 437, is one in which various questions involved in the case before us are discussed. In the opinion appears the following:

"'There is a decided conflict in the authorities as to when the carrier's liability as such ceases and its liability as warehouseman only begins. One class of cases adopts what is known as the "Massachusetts rule," while another class of cases follows what is called the "New Hampshire doctrine." The Massachusetts rule is this: When the transit is ended, and the carrier has placed the goods in his warehouse to await the delivery to the consignee, his liability as carrier is ended also, though no notice is given to the consignee, and he is responsible as warehouseman only. Thomas v. Boston & P. R. Corp., 10 Metc. (Mass.) 472, 43 Am. Dec. 444, approved in Norway Plains Co. v. Boston & M. R. Co., 1 Gray (Mass.) 263, 61 Am. Dec. 423. This rule has been adopted or followed in Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, New Jersey and Pennsylvania. The New Hampshire doctrine holds that the carrier's liability as insurer continues after the arrival of the goods at their destination and until the consignee has had a reasonable time in which to call for and remove them, and that the carrier is bound to notify the consignee of the arrival of the goods, and that the reasonable time does not begin to run until such notice, where practicable, has been given. Moses v. Boston & M. R. Co., 32 N. H. 523, 64 Am. Dec. 381, where it was said, in commenting on the rule laid down in Norway Plains Co. v. Boston & M. R. Co., supra, that the Massachusetts rule was of "a plain, precise and practical character," but that "by it the salutary and approved principles of the common law are sacrificed to considerations of convenience and ex-

pediency." The lead of New Hampshire has been followed by the courts of Alabama, California, Connecticut, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New York, Ohio, Vermont, and Texas. * * * The precise question we are considering does not seem to have been passed on in Maryland. We adopt as the more reasonable view the New Hampshire rule, and the doctrine of the English cases; and this brings us to inquire what is a reasonable time within which, after notice to the consignee of the arrival of the goods, he is required to remove them if he does not wish the liability of the carrier as such to terminate while the goods are still actually undelivered. "Reasonable time" has been defined as being such time as would enable one who resided in the vicinity of the place of delivery, and was informed of the probable time of the arrival of the goods and of the course of the carrier's business, to inspect and remove the goods during business hours. 5 Am. & Eng. Enc. Law, p. 270, and cases cited in note 3. Thus where the consignee was notified after 10 o'clock Saturday morning of the arrival of his goods, and the day was a very stormy one, it was held that a finding that the following Monday morning was a reasonable time for removal would not be disturbed on appeal. Solomon v. Philadelphia & N. Y. Exp. S. B. Co., 2 Daly (N. Y.) 104. In Lemke v. Chicago, M. & St. P. R. Co., 39 Wis. 449, where it appeared that the goods arrived at the place of destination on a Saturday evening, and were destroyed by an accidental fire on the Tuesday following, about noon, it was held that the owner had had a reasonable time in which to remove them, and that the company's liability ceased. In the case at arrived early on Friday notice of their arrival the consignee some tim of the same day. Ther of that day and the wh suing day, Saturday, du consignee could have goods from the wharf c That period was a re within which the co have removed the gooc facts are undisputed, t what is a reasonable t law. 6 Cyc. Law & Pr 47.'

"In that case it was l lay of 1½ business da to a consignee of the goods terminates the carrier as such. In t is an interesting dis cases, as to what con able time.

"In the case of St way Co., 133 Mich. 1 cussion of the duti of carriers of goods ees of goods, with many standard auth is so accessible tha selves by referrin scan the record of in vain for any tes the inference ma that the potatoes ious to the 5th d At that time on been in the war edge of the con days, and the o days. It is not found in the bc rier liable und As to the Nor

should have directed a verdict
'or of the defendant.
e may now consider the ship-
made to Pittsburg. These ship-
were made in refrigerator
n which stoves might have been
l but were not. One of the cars
onsigned January 5, 1912. It ar-
at Pittsburg January 13th, and
onsignees were notified at once.
of the potatoes were frozen.
second car was consigned Feb-
28th, and arrived early in the
ing of March 9th, and within
hours the consignees were noti-
Some of these potatoes were
en.
is the claim of the plaintiff that
of these cars should have
hed Pittsburg three days earlier
they did, and that because of
delay the defendant should pay
the frozen potatoes. It is not
wn at what time the potatoes were
:en.
In the case of the Michigan Cen-
Railroad Co. v. Burrows, 33
ch. 6, a claim was made for dam-
s because of the freezing of ap-
s which it was claimed was caused
delay in transportation. In the
inion occurs the following:
"'If in the ordinary course of
ents a certain result usually follows
om a given cause, then we may well
nsider the immediate relation of the
ne to the other to be established.
old, freezing weather does not, how-
er, in the ordinary course of events,
llow from mere delay; such is not
e natural and direct result of the
lay. It is true that in certain cli-
tes and at certain seasons such an
ury would be much more likely to
ult from delay, while at others
re would be not even a possibil-
of such a result following. It is
very evident, therefore, that as we approach the one or the other we must enter upon debatable ground, where it would be very difficult, if not indeed impossible, to say what the result of a given delay would be. Where fruit is to be carried a long distance, especially in such a country as this, where the climate is so changeable, it would as frequently result that delay would be the cause of averting such an injury as of contributing to it. It may be true that had there been no delay whatever on the part of defendant, the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the concurring circumstances which may have assisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for when once we leave the direct, and go to seeking after remote causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts. Lord Bacon said: "It were infinite for the law to consider the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon's Maxims. The following cases are so directly in point and the reasoning therein so satisfactory, that a reference thereto will render any farther discussion unnecessary. Denny v. N. Y. C. R. R., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Morrison v. Davis, 20 Pa. 171, 57 Am. Dec. 695; Hoadley v. Northern Transportation Co., 115 Mass. 304, 15 Am. Rep. 106.'

carrier which holds goods as a warehouseman for l
not governed by the state law, but by federal law

"In the recent case of Lardie & Son v. Railroad Co., 158 N. W. 31, the defendant was sued to recover damages for the freezing of potatoes. Justice Kuhn, speaking for the court, cited with approval the case of Railroad Co. v. Burrows, supra, and it was held there was no liability. See, also, Herring v. Railroad Co. et al., 101 Va. 778, 45 S. E. 322.

"In the instant case can it be said with a certainty that if the potatoes had reached Pittsburg within the five days which it is conceded it should have taken to reach there, none of them would have been frozen? We think the answer would have been mere conjecture. Applying the principles stated in the cases cited to the case before us, we think the trial judge should have directed a verdict as to the Pittsburg shipments in favor of the defendant."

The carrier's liability as such continues even after arrival of the goods at destination, until the consignee is given a reasonable time in which to remove them. The shipment must be so placed that the consignee can get at it to unload or remove it and until they are so placed, the liability of the carrier as an insurer continues.

108. Southern R. Co. v. Prescott, 240 U. S. 642, 60 L. Ed.—, 36 Sup. Ct. 469, 473.

This is so because with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Texas & P. 1
202 U. S. 242, 50 L
Sup. Ct. Rep. 628;
Southern R. Co. v. (
639, 652, 57 L. ed. 68
Ct. Rep. 391; Boston
Hooker, 233 U. S. 97,
868, 886, L. R. A.
Sup. Ct. Rep. 526, Ar
593; Louisville & N. 1
well, 237 U. S. 94, 59
R. A. 1915E, 665, P.
300, 35 Sup. Ct. Rep.
established principle
to any stipulation atte
the provisions as fixe
lished rules relating
services within the p
act. Chicago & A. R
225 U. S. 155, 166, 5
1038, 32 Sup. Ct. Rep.
1914A, 501; Atchison,
Co. v. Robinson, 233
58 L. ed. 901, 905, 34
556. This is the plain
statute in order to shu
contrivances in violat
visions against prefer
criminations. No carr
"any privileges or fac
these have been duly
as the terminal servi
an interstate shipment
Federal act, and the
liability while the goo
after notice of arriva
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regulations, the condit
are controlling, and th
substitute therefor a
ment. Southern R. (
240 U. S. 632, 60 L.
Ct. 469, 472.

of the carrier's liability as warehouseman under a bill
; for an interstate shipment, issued pursuant to the In-
Commerce Act, which, in accordance with the carrier's
l regulations, provided that every service to be performed
should be subject to the conditions specified, among
as an express condition governing the carrier's responsi-
warehouseman for property not removed within forty-
urs after notice of arrival—is not to be tested by the
nal rule of the local law, placing the burden upon a
seman, in case of loss by fire, to show that it was not
t.[109] But the arrival of an interstate shipment at des-
the payment of the freight by the consignee, his signa-
a receipt for the shipment, and his removal of a part
leaving the rest, with the carrier's permission, to await
enience in removal, did not discharge the carrier's lia-
ıder the bill of lading issued pursuant to the Act, nor
new obligation as warehouseman, governed by the
v, which casts upon the warehouseman, in case of loss
the burden of showing that it was not negligent, where
of lading in accordance with the published regulations,
l that every service to be performed under it should be
to the conditions governing the carrier's responsibilty as
ıseman for property not removed within forty-eight
ter notice of arrival.[110] Therefore, the liability of a ter-

outhern R. Co. v. Prescott, . 632, 60 L. Ed.—, 36 Sup. 170.

outhern R. Co. v. Prescott, . 632, 60 L. Ed.—, 36 Sup. 170.

reland, C. C. & St. L. Ry. ttlebach, 239 U. S. 588, 60 36 Sup. Ct. 177, 180, the tates Supreme Court said: this and other provisions of urn act it is evident that recognized that the duty of o the public included the ıce of a variety of service rding to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intend-

minal carrier in an interstate shipment for a loss due to its negligence while the goods were in its possession as warehouseman at the place of destination must be regarded as controlled by a limitation to an agreed valuation made to adjust the rate contained in the uniform bill of lading issued by the initial carrier, in view of the provisions of the Hepburn Act, enlarging the definition of the term "transportation" so as to include all services rendered in connection therewith, and of a provision of the bill of lading that "every service to be performed hereunder" is subject to all the conditions therein contained. [111] The liability of a carrier as warehouseman is involved so frequently that the question of such liability is a very important one. Frequently when goods are refused at destination, or the consignee cannot be found, the proper care to be given the shipment is often a vexing question. If the carrier keeps the goods on the sidetrack demurrage accrues. If it stores the goods the shipment may not bring the freight and storage. Furthermore, the shipment may refuse to pay the warehousing charges on the ground the storage was not authorized, and thus the right of the warehouse to a lien be involved. It seems, by the weight of authority, the right of a carrier to store an unclaimed shipment, notify the consignor, and thereafter the warehouse charges are a valid lien against the shipment. [112] Of course, the carrier as warehouseman is not an

ed to be and not in law binding upon the carriers, is entitled to some weight. It recognizes—whether correctly or not is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods. We conclude that, under the provisions of the Hepburn act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman."

111. Cleveland, C. C. & St. L. R. Co., v. Dettlebach, 239 U. S. 588, 60 L. Ed.—, 36 Sup. Ct. 177.

112. The warehouse, as an innocent third party, is not a party to the contract of transportation. Under the law of practically every state in the Union a warehouseman

has a lien for his charges. Therefore, as far as the possession of the warehouse company is concerned, it can legally hold the shipment for its charges.

Now assuming the shipment is ultimately sold for charges and the amount obtained does not cover the storage charges, who is to pay the difference? This question can only be answered with reference to the facts surrounding each particular case. The only theory on which a shipper can be held is that he has in some way authorized the carrier to store the goods. If the shipper has not expressly or impliedly given the carrier authority to store the goods for his account, then the carrier is liable to the warehouse and not the shipper. Express authority to store the shipment, of course, would be an instruction to the railroad to do so. Implied authority may arise for instance in this way. The carrier might notify the shipper that the goods had been rejected and unless otherwise directed would place them in a specified public warehouse, and the shipper by not countermanding such proposal might be held to have impliedly authorized it. But the mere rejection of the goods by the consignee does not authorize the railroad company to store the goods with a warehouse so that the shipper in total ignorance of such proceeding can after a long period be held for the charges over and above the value of the shipment.

In this connection it must be remembered that circumstances may arise where although the carrier may not originally have the authority to store the goods, still the shipper may by subsequent action ratify such act. This is why each case has to depend upon its own facts.

Now as to the right of the carrier to store the goods. If a consignee fails or refuses to receive the goods, it is the duty of the carrier to properly conserve the shipment. It is therefore its duty to store the goods and in many jurisdictions to immediately notify the consignor of the consignee's refusal to receive the goods.

T. & E. Eddy (U. S.) 5 Wall. 481, 18 L. Ed. 486.

American Sugar Refin. Co. v. McGhee, 96 Ga. 21 S. E. 383.

Alabama, etc., R. R. Co. v. McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A., N. S., 18.

American Merchants' Union Exp. Co. v. Wolf, 79 Ill. 430.

Michigan Cent. R. R. Co. v. Harville, 136 Ill. App. 243.

Nashville, etc., R. Co. v. Dreyfuss-Weil Co., 150 S. W. 321, 150 Ky. 333.

Carrizzo v. New York, etc., R. Co., 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S. 579.

Manhattan Rubber Shoe Co. v. Chicago, etc., R. Co., 41 N. Y. S. 83, 9 App. Div. 172, 75 N. Y. St. Rep. 544.

There are cases which hold to the contrary:

Kremer v. Southern Express Co., 6 Coldw. (Tenn.), 356.

Steamboat Keystone v. Moies, 28 Mo. 243, 75 Am. Dec. 123.

Lesinsky v. Great Western Dispatch 13 Mo. App. 575.

Hull v. Missouri Pac. R. Co., 60 Mo. App. 593.

Hudson v. Baxendale, 2 H. & N. 575.

The courts of the country are divided on this question but the weight of authority is that the notice of re-

insurer, and only liable for loss if it fails to use ordinary care.[113]

13. Disputes Over Charges. While cases of this kind are somewhat rare, yet claims often arise through the action of the carrier in demanding excessive charges or unlawful charges. Naturally consignees are in a position where a peculiar force can be brought upon them, if a dispute over charges arise and a shipment remains on the side-track with demurrage accruing. The consignee may have resold the shipment, or needed it for busi-

jection must be given to the consignor.

Except in those few jurisdictions, therefore, which hold a contrary doctrine, the carrier can not collect for storage charges unless notice has been given the consignor of the rejection or non-acceptance of the goods. Storage charges, to be legally applicable by the carrier, must be filed with the Interstate Commerce Commission, and if they are not, they cannot be collected.

113. The difference between a carrier's obligations as insurer and warehouseman is illustrated by the following excerpts from leading text writers.

Moore on Carriers, Second Edition, p. 236, states the law as follows:

"Where, however, the relation of the parties is not that of carrier and owner or consignee, or where the responsibility of the carrier has terminated and that of warehouseman has commenced or exists, the strict rule of responsibility as insurer does not prevail, and the carrier is responsible for proper diligence and care only in the preservation of the property and its delivery to the true owner, and liable only for losses resulting from its own negligence."

Michie on Carriers, p. 910, states the rule as follows:

"It is held that a carrier which has carried property for hire and is keeping it for a reasonable time in its own warehouse, at the point of destination, until it shall be called for, is a bailee for hire. As such it is liable only for the want of ordinary care in the custody of the goods; and the care exercised should be in proportion to the loss likely to be sustained by want of such care. A carrier as warehouseman is liable for the loss or destruction of goods caused by its negligence. In the absence of negligence on its part, a carrier is not liable for damages caused to the goods by storm or for their loss by theft or fire. A carrier, as warehouseman, is not liable for the destruction of goods caused by the negligence of its employee, who was an independent contractor."

In other words, if the carrier's liability as insurer has ceased different facts must be shown to make it responsible as warehouseman, than are necessary to hold it liable as carrier.

The rule governing cases of this kind is well stated in Hutchinson on Carriers, third edition, section 685, as follows:

"Whenever the carrier can show that the delivery was impossible, from inability to find the consignee, or from his refusal to accept the

ness purposes and suffered an injury proportionate to the duration of the argument. If the carrier is right in the dispute then the consignee is without any remedy. On account of the superior facilities of the carrier to ascertain the lawful charges it would seem only reasonable to require the consignee to pay the charges under protest, and if unlawful he would then have an ample remedy against the carrier. Of course, some consignees may not wish to do this, but they always run the risk of being without any means of recovering the loss in the event the carrier is shown to be right. In a typical case it was held, if a railroad company was entitled to charge the amount of freight demanded, it had the right to hold the shipment until it was paid, and the damage occurring while it was being so held was damages accruing or arising out of the shipment covered by the contract made, and if it demanded freight it was not entitled to receive, and wrongfully held the shipment to compel the payment thereof, it was still liable for such refusal to deliver as a common carrier,[114] and answerable therefor only in accordance with the

goods, or from his unreasonable delay in taking them away, when that duty devolves upon him acrording to the course of the business of the carrier, or that from any other cause his obligation as a carrier has ceased and the less burdensome one of warehouseman has supervened, he may further show that the loss which has occurred was not attributable to his fault or negligence, and thereby excuse himself from liability. If, for instance, the goods have been destroyed by an accidental fire; by an explosion of dangerous goods, of the character of which he was not aware; by leakage from a defect in a cask; or have depreciated in market value; or have been lost by theft or robbery, without the fault or negligence of the carrier, and he can show that his relation to the goods as common carrier had, before such loss, been changed to that of a mere custodian of the goods for the consignor or owner, he will be excused, although he would have been unquestionably liable in his character as carrier."

Kansas City Southern Ry. Co. v. Bull, (Ark. 1915) 179 S. W. 172, 174.

An express company refusing to deliver property to the consignee, upon his payment of his charges was guilty of a conversion. Southern Express Co. v. Reagin, 228 Fed. 14.

A carrier must deliver up a shipment upon receiving proper transportation charges. It cannot hold the shipment until a claim growing out of a different matter entirely is satisfied by the owner. Southern Express Co. v. Reagin, 228 Fed. 14.

The refusal of a shipper to pay more than the contract rate for freight, which was less than the proper rate, does not affect his right to recover for conversion, where the carrier would not accept the proper

stipulation in the contract of carriage limiting the time in which suits should be brought for damages arising out of the ship-

rate, but sold the goods for its charges. Pecos & N. T. Ry. Co. v. Porter (Tex. 1916), 183 S. W. 98.

An action against a carrier for damages on the demand of an excessive freight charge, which the shipper refused to pay, and the sale of the goods for charges, is one for conversion. Pecos & N. T. Ry. Co. v. Porter (Tex. 1916), 183 S. W. 98.

That the agent of a carrier demanded only a small amount in excess of the legal rate, and the demand was honestly made without wrongful intent, does not affect the shipper's right of recovery for conversion by the sale of the goods on refusal of the shipper to pay the charge; "conversion" being any distinct act or dominion wrongfully exerted over another's property in denial of his right or inconsistent with it. Pecos & N. T. Ry. Co. v. Porter (Tex. 1916), 183 S. W. 98, 99.

In an action for conversion by a carrier on refusal of the shipper to pay an excessive freight rate, the award of the Interstate Commerce Commission determining the proper rate for shipment was admissible in evidence. Pecos & N. T. Ry. Co. v. Porter (Tex. 1916), 183 S. W. 98, 99.

Sec. 3 of the Interstate Commerce Act provides as follows inter alia:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This section, it will be noted, imposes upon the carriers the obligation of promptly carrying the commerce of the country over connecting lines of roads, subject, of course, to such reasonable regulations as may be formulated by them and carried in lawful tariff authority. It has been well stated by the Interstate Commerce Commission that, so long as a connecting carrier holds itself out as a common carrier and through carriers make joint rates with it, innocent third parties have a right to assume that the road is what it purports to be and the published tariff lawful. An innocent third party is not concerned as to the legality of the published charge or the legality of the common carrier.

Crescent Coal & Mining Co. v. C. & E. I. R. R. Co., 24 I. C., 149, 156.

Furthermore, the lines of interstate carriers are public highways the use of which cannot be restricted by railroad companies in their own interest regardless of the rights of shippers.

Memphis Hay & Grain Asso. v. St. L. & S. F. R. R. Co., 24 I. C. C. 609, 615.

In Quanah, A. & P. R. R. Co., (Tex. 1915), 178, S. W. 858, an initial carrier held a shipment of roofing in transit for failure of delivering

ment to six months after the damage occurred, or the cause of action accrued.[115] And where a railroad company wrongfully caused a delay at destination owing to its demand for excessive charges by reason of which demurrage accrued, and the shipment had to be reconsigned to another market in order to save loss, the railroad is liable for the demurrage charges and the freight rate from destination to the market where eventually sold.[116] However, by statute in some states the carrier cannot compel the consignee to prepay the charges before delivery. Thus in Georgia under the ruling in Florida & Alabama R. Co. v. Elliott, 3 Ga. App. 773 (2), 60 S. E. 363, the consignee is not required to tender the amount due the carrier for freight charges in advance of a demand that a "solid" car be so placed as to make its unloading practicable; and under the ruling in Southern Express Company v. Briggs, 1 Ga. App. 294 (4), 57 S. E. 1066, a failure to deliver a shipment, or the postponement of delivery of such shipment until the necessity for its use has passed, will support an action for the conversion of the property, and a recovery of the value of the property thus held by the carrier as damages.[117] And a railroad company is liable for conversion where it attempts to exact the highest of two conflicting rates on shipments of onions and upon payment being refused, sends a corrected bill on the lowest of such rates; and then sells the onions as perishable freight within two days thereafter.[118]

14. **Concealed Loss.** A very aggravating class of claims are what is known as "concealed loss." These are claims for injuries not discovered until the shipment has passed out of the custody of the carrier. Thus, a case of crayons is shipped from Pittsburgh to San Francisco by way of New York. After arrival the consignee places the shipment in a warehouse. Several days later the shipment is opened and the crayons are broken. If claim is made against the initial carrier it will claim

fuses to deliver because of an illegal demand for charges.

115. Kansas City Southern Ry. v. Bull, (Ark. 1915), 179 S. W., 172, 174.

116. St. L. I. M. & S. Ry. Co. v. Allen, (Ark. 1915), 175 S. W., 514, 515.

117. Southern Ry. Co. v. Morgan, (Ga. 1915), 85 S. E. 933.

118. Dreyfus v. Penn. R. Co., 153 N. Y. S. 966, 969.

either the steamer or the truckman was guilty of the injury. But claims of this kind, if supported by proper legal proof, are just as valid as any other kind. The principal point to investigate is the treatment accorded the shipment while transporting it from the delivering carrier to the warehouse. If witnesses can testify the shipment was carefully unloaded from the car, carefully loaded into the truck, carefully unloaded into the warehouse, and that it experienced no rough handling en route, the claimant has made out a case which should entitle him to recover against the carrier. This may be further strengthened by the fact that other shipments of a similar character were uninjured under like conditions, altho the admissibility of such evidence is dubious in certain jurisdictions. So, in an action to recover the value of goods claimed to have been lost in transit, before the claimant is entitled to recover, it is incumbent upon him to prove that the loss in question occurred while the goods were in the carrier's possession. Generally the missing link in the proof is the care taken of the shipment from the time of its delivery by the carrier to the truckman sent to take the shipment from its possession, to the time when he made delivery thereof to the claimant. To make out a complete case there should be proof that the goods were not lost, injured or stolen while in the possession of the truckman.[119] In claims for concealed loss, where the goods have been drayed from the station or from a team-track to a warehouse, or have been drayed to the car, and the loss is not discovered until after the goods are in the warehouse of the consignee, it is extremely important that the claimant show how the goods were handled by the truckman, otherwise the jury cannot judge whether the loss occurred while in the custody of the carrier or in the custody of agents of the shipper or consignee. In a very recent case, a suit on such a claim was lost because the claimant failed to show these essential things. In this case it appeared claimant brought suit to recover damages for part of goods which were pilfered in transit but which were not discovered until after delivery to the

119. Canfield v. B. & O. R. R., 75 N. Y. 144; Hirsch v. Hudson R. Line, 26 Misc. Rep. 823, 57 N. Y. Supp. 272; Baer v. N. Y. C. & H. R. R., 83 Misc. Rep. 88, 144 N. Y. Supp. 682; Silverman v. Cleveland, C. C. & St. L. Ry., 157 N. Y. S. 876, 877.

consignee. The evidence failed to show how the goods we handled by the truckman and did not show that there was opportunity to pilfer while in his custody. The court said: "Careful consideration of the evidence contained in the co mission and taken before me in open court discloses that t plaintiff has failed to meet the burden of proof which the l imposes upon him in this case. It is a fact, which can be eas determined from the evidence, that a certain portion of t goods contained in the box in question were extracted the from at some time between the time when they left the sto house of the consignor and the time when they were deliver to the truckman, Mr. Wilson at Niagara Falls, the agent of t consignee. Exactly when and where and how these goo were taken is not apparent from the proof, and it is impossil for the court to say from the evidence whether the goods we taken while the box in question was in the actual custody the defendant railroad company, or while it was in the custo of the agents of the consignor, while being delivered from t warehouse of the consignor to the receiving station of the Ne York Central Railroad in the city of New York. Plaintif proof is lacking in respect to the custody of the box at th point in the shipment. There is no evidence in the case show who handled the box, or where it was, between the tin it was loaded on a truck by the witness Andrew J. Durkin a the time it was received at the pier of the defendant in Ne York City. The burden of the proof on this point is upon t plaintiff. He has failed to meet it, and the most that can l said is that it can only be a matter of conjecture for the cou as to where and at what point in this shipment the box w opened and goods taken therefrom. See Baer v. New Yo Central, 83 Misc. Rep. 88, 144 N. Y. S. 682; Openhym et al. Maine S. S. Co. (Sup.) 127 N. Y. S. 463; Canfield v. Baltimo & Ohio Railroad Co., 75 N. Y. 144. I do not think that t clause contained in the receipt given by the defendant to plai tiff's consignor at the time of the receipt of the shipment question, containing the words, 'Received * * * in appare good order, except as noted (contents and conditions of conten

120. Wallens v. N. Y. C. & H. R. R. Co., 166 N. Y. S. 1083, 1084.

of package unknown),' changes the legal phase of the transaction. See Miller v. Railroad Co., 90 N. Y. 430, 43 Am. Rep. 179; Jean Garrison & Co. v. Flagg, 45 Misc. Rep. 421, 90 N. Y. S. 289; Thyll v. Railroad Co. (Sup.) 84 N. Y. S. 175." Where a bale of cotton is alleged to have been delivered short of weight and the carrier shows that it delivered the bale in good condition with no signs of pilfering, it overcomes the presumption that the loss occurred while in its custody.[121] In many instances, particularly of package freight, damage is not discoverable until after the consignee has the shipment in his possession. Thus a package may be outwardly unharmed but the contents injured. Claims of this kind are as valid as any other, but the proof should be such as to show the injury occurred while the shipment was in the possession of the railway. It is competent to show the care with which the shipment was loaded in the car, the manner of unloading, the condition of the streets over which was drayed to the consignee, i. e., whether rough or smooth, and the care with which it was unloaded. Such evidence gives the jury an opportunity to judge whether the injury could have occurred when the shipment was not in the possession of the railway. Even with a favorable showing the carrier may not be held liable. A lacing machine was shipped in a new box, upon arrival delivered to a public truckman and upon delivery, when opened, the "goose neck" was found to be broken and the machine in other respects damaged. It appeared that there was a slight crack in the front of the machine when it was packed. The streets to the railway were smooth and in good condition. Held such facts did not show liability on the part of the carrier[122]

121. Rogen v. N. Y. R. Co., (S. C. 1917), 93 S. E. 860.

122. Edwin B. Stimpson Co. v. C. B. & Q. R. Co., 164 N. Y. S. 68.

In Spann v. Ala. & V. R. R. Co., (Miss. 1917), 74 So. 141, the facts appeared as follows:

The testimony of the claimant showed that a piano was wrapped in a clean, dry sheet, packed in a piano box, and delivered to the agent of the railroad company at Meridian in good condition; that, about four days thereafter, the piano was properly hauled from the depot at Pelahatchie to the residence of the claimant, and when the piano box was opened and the piano taken out it was found that the wood on the front of the piano had become very badly blistered. The attention of the agent of the defend-

ant company at Pelahatchie was immediately called to the condition of the piano. In short, the testimony for the claimant shows that the piano was properly packed and delivered to the railroad company in good condition, and that it was in a damaged condition when received by plaintiff at Pelahatchie. The employes of the railroad company who testified in the case had no positive knowledge of the handling of the piano, but testified that from their records the piano was properly loaded at Meridian, placed in a suitable car which contained no freight that would cause injury to the piano, and was transported under seal from Meridian to Pelahatchie. It was neither hot nor cold and did not rain while the piano was in the hands of the railroad company. The railroad company also attempted to prove that the piano was improperly packed; that it should have been wrapped in paper instead of a sheet. The court said:

"When the plaintiff proved that the piano was in good condition when delivered to the defendant and was by the defendant delivered to it in bad condition, then it devolved upon the defendant to show that the damage to the piano did not occur while the piano was in its possession, or that, if it did so occur, then the damage was caused 'by the act of God, the public enemy, quarantine, the authority of law, or an act or default of the shipper or owner.' The carrier attempted to prove that the damage was caused by the act of the shipper in improperly packing the piano. The burden of proof in this case to prove one of the above excepted causes rested upon the defendant.

" 'Proof of the delivery of the goods to the carrier in good order and their loss or injury makes it a prima facie case for the owner of the goods within this rule.' 6 Thompson on Negligence, § 7709.

" 'We think the better reason and policy and the greater number of cases favor the rule to require the carrier which delivers goods damaged, and which are shown to have started on their journey over connecting lines of transportation in good condition, to exculpate itself from liability by showing that the injury did not occur by its default.' M. & O. R. R. Co. v. Tupelo Furniture Mfg. Co., 67 Miss. 35, 7 South. 279, 19 Am. St. Rep. 262.

" 'The burden was upon the defendant to show that the loss occurred without fault on its part, and this burden defendant failed to meet.' Southern Express Co. v. Seide, 67 Miss. 609, 7 South. 547.

" 'The rules above cited are where the bills of lading or express receipts provided that the carriers were only liable when the goods were damaged on account of negligence. In the bill of lading in the instant case, however, the carrier is an insurer of the property and would for this reason have to show that the damage to the piano was due to one of the excepted causes contained in its bill of lading above set out."

V.

LIABILITY FOR NEGLIGENCE

1. In General.
 —Liability of Common Carriers Under the Common Law.
 —Liability of Common Carriers Under Federal Statutes.
2. Shortages.
3. Liability of Receivers.
4. Initial Carrier.
5. Connecting Carrier.
6. Delivering Carrier.

In General. By common law a carrier is an insurer, and is responsible for all losses except those resulting from the act of God, or the public enemy, or the fault of the shipper.[1] And under the common-law rule of liability recovery for failure to deliver the goods is not dependent upon proof of negligence or fault on the part of the carrier, for the liability, aside from any question of exceptions to the rule which are not embraced in this statement, is that of insurer and would include a liability on the part of the carrier for loss occasioned by third persons, intermeddlers, brawlers, or thieves[2]. If the claimant shows that the shipment was given to the carrier in good condition and was delivered by it in a damaged condition, then on the face of it, the carrier has been guilty of negligence, and can only relieve itself from liability by showing it was not negligent, and that the injury is due to a cause which relieves it from liability.[3] At

1. A. L. Ry. v. Enterprise Cotton Oil Co. (Ala. 1917) 74 So. 232.

Charges founded upon a wrongful reshipment of goods from their destination, after delivery there, are illegal, and detention of the goods, on their return to the place of destination, for nonpayment thereof, is wrongful and subjects the carrier to absolute liability for loss thereof occurring within the period of such detention. Belknap v. Baltimore & O. R. Co. (W. Va. 1917) 91 S. E. 656.

A carrier is liable for all loss sus-

tained to a shipment unless occasioned either through the fault of the shipper, the inherent character of the shipment, an act of God, or the operation of law. When a shipper, in an action to recover the value of grain lost in transit, introduces in evidence a bill of lading calling for a delivery of a certain specified amount of grain at the point of destination, and then proves that a less amount was delivered, the presumption arises that the loss was caused by the negligence of the carrier, and it then becomes necessary for the carrier to prove the contrary by a fair preponderance of evidence. Natl. Elev. Co. v. G. N. R. Co. (Minn. 1917), 163 N. W. 164.

Where a tank car was unloaded by removing a tap on a pipe in the bottom and connecting a pipe, and then opening a valve from the top of the tank, the railroad is not liable for loss of oil by reason of the valve being open when the tap was removed at destination; the tank being filled by the claimant before starting. H. & T. C. R. Co. v. Oriental Oil Co. (Tex. 1917), 198 S. W. 601.

Where a railroad engaged to carry mules free of charge for its contractor to do repair work to the place where the work was to be done, the road was liable for ordinary negligence resulting in the injury of a mule; the carriage being for the benefit both of the road and the contractor. Bush v. Beacon (Ark. 1917), 198 S. W. 130.

A carrier of live stock is an insurer against all perils except the act of God, the public enemy, shipper's negligence, and animal's proper vice. Baker v. Bush (Mo. 1917), 194 S. W. 1061.

Shipment having been on a thr
bill of lading, each of the carrie
responsible for damages to the g
in transit. Patterson & Rober
Q. A. & P. Ry. Co. (Tex. 1917)
S. W. 1163.

A common carrier accepting g
for transportation is liable, irre
tive of the care he uses, for lo
damage to them in his custody,
less caused by act of God, the p
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public authority, the inherent na
of the property, or some cause ag
which he has lawfully contra
Haglin-Stahr Co. v. Montpelier &
R. R. Co. (Vt. 1918), 102 Atl. 94

In Haglin-Stahr Co. v. Montp
& W. R. R. Co. (Vt. 1978), 102
940, the court said, p. 941:

"While the common-law rule i
above set forth, a comprehen
statement of the law as now ge
ally recognized and accepted is
such a carrier is liable for such
or damage, unless caused by the
of God, the public enemies, the f
of the shipper, acts of public auth
ity, the inherent nature of the pr
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had lawfully contracted. In spe
ing of this extraordinary liability
a common carrier, it should be c
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more or less customary to use
term 'negligence' in speaking of
the 'prudent man' rule as comm
understood has no application.
that it is necessary to show in or
to establish prima facie liability
that the goods were delivered to
carrier in good condition, and
they arrived in bad condition. U
such a showing, the carrier is c
clusively presumed to be at fa
unless he shows that the damage
sulted from some of the causes ab

ied. No matter how careful he een, his calling makes him liable very loss not caused by the ex- l perils."

ıere a carrier of live stock un- kes to erect a partition in a car to separate the animals, it must, dless of the primary duty of ng the partition, construct a nably safe one. Crow v. Bush 1918) 200 S. W. 762.

carrier of live stock which un- the animals as an incident to portation is bound to exercise in preventing their escape from pens. Snyder v. King (Mich. 165 N. W. 840.

ıere the precooling of refrigera- ırs took place after the delivery ·esh vegetables to the carrier, gence in precooling and icing the is attributable, not to the ship- ıut to the carrier. Wells Fargo). v. Sprague (Tex. 1917) 199 . 657.

der U. S. Comp. St. 1916, § 8651, ding that live stock shall not be ıed in cars for more than 28 ; without unloading the same for water, and food, etc., and sec- 3652, declaring that animals so ded shall be properly fed and ·ed during such rest either by wner or the person having cus- thereof or in case of his default ıe railroad company transport- ıe animals at the reasonable ex- of the owner, a railroad com- cannot escape liability for in- ; resulting to a shipment of s which it negligently allowed to e from stock pens into which l unloaded them for food, rest, water, where charges for food water were made by the com- and paid by the shipper, on the ıd that the uniform live stock contract under which the interstate shipment was made declared that the shipper is at his own risk and expense in unloading, caring for, feeding, and watering the stock, and that the carrier is under no liability with reference thereto, for the statute itself makes the feeding and watering of the stock an incident of the transportation. Snyder v. King (Mich. 1917) 165 N. W. 840.

A common carrier is liable for all loss or injury not due to the act of God or the public enemy, the inherent nature or qualities of the goods, or the act or fault of the owner or shipper, although as to those excepted cases the carrier may be liable by reason of negligence. Robinson v. Bush (Mo. 1918) 200 S. W. 757.

In an action for damage for delay in transporting cattle, the court instructed the jury that if, when the cattle were tendered for shipment, the defendant knew of conditions likely to cause delay in transportation, and the shipper did not, the defendant should have informed the shipper of the conditions, in order to excuse liability for delay which the conditions occasioned. Held, the instruction stated the law, and was appropriate to the issues. Ott v. A., T. & S. F. Ry. Co. (Kans. 1918) 169 Pac. 957.

Where plaintiff consigned wool to itself at St. Louis, and the wool was later consigned to plaintiff at Philadelphia, plaintiff's claim for conversion at Philadelphia by the ultimate carrier waived any right based on conversion at St. Louis by the reconsignment and ratified the reconsignment. Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367.

Where there is a congestion of

freight on a carrier's line which is thought to cause delay in transportation, it is its duty to notify a shipper of such congestion at the time he tenders his shipment in order to excuse itself from liability to delay due to such causes. Ott. v. A., T. & S. F. Ry. Co. (Kans. 1918), 169 Pac. 957.

Where goods are consigned from a point in Iowa to St. Louis and from St. Louis transported to Philadelphia, and the claimant brings suit for conversion of the goods at Philadelphia, it is estopped from claiming that the reconsignment from St. Louis to Philadelphia was unauthorized, since the claim for the conversion at Philadelphia ratified such reconsignment. Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367.

Even as respects an interstate shipment a carrier cannot contract against liability for its negligence. . Wells Fargo & Co. v. Sprague (Tex. 1917), 199 S. W. 657.

Contracts for the interstate shipment of live stock cannot exempt the carrier from liability for losses occasioned by its own negligence. Bilby v. A., T. & S. F. Ry. Co. (Mo. 1917), 199 S. W. 1004.

In an action for damages to an interstate shipment of live stock in which the carrier's liability was governed by the Carmack Amendment, where claimant alleged the negligence of the railroad company instead of relying on its common-law liability as an insurer, he must, having averred the negligence, prove it as alleged, or there can be no recovery. Robinson v. Bush (Mo. 1918), 200 S. W. 757. This rule, however, is peculiar to a few jurisdictions.

Prima facie liability of a common carrier for loss or damage to in his possession is establishe showing that they were deliver the carrier in good condition that they arrived in bad conc Haglin-Stahr Co. v. Monpelier R. R. Co. (Vt. 1918), 102 Atl

The Carmack Amendment do affect the common-law rule that a carrier of goods relies upon o the excepted causes of damag a defense, in action by the sh for damages, the carrier must lish the fact that the damages imately resulted therefrom. H Stahr Co. v. Montpelier & W. Co. (Vt. 1918), 102 Atl. 940.

And where there is no special tract regarding the carrier's li for the shipment, the commo rule of liability will govern. At Coast Line Ry. Co. v. Ente Cotton Oil Co. (Ala. 1917), 7 232.

A. C. L. Ry. Co. v. Enterprise ton Oil Co. (Ala. 1917), 74 So

In Atlantic Coast Line Ry. Enterprise Cotton Oil Co. (Ala. 74 So. 232, the court said, p. 23

"Our court in Steel & Burg Townsend, 37 Ala. 247, 79 Am. 49, said:

"'By the common law, the c is responsible for all losses, e such as result from the act of or the public enemy. Hence h bility is not confined to such as are the consequences of his negligence, or want of skill. liable for losses by accident, mi and numerous unavoidable rences, not falling under the he acts of God or the public e and against which it is not the reach of human vigilance or sight to provide. For losses sioned by the wrongful acts of

persons, by accidental fires, by robbery, or by the violence of mobs, which neither the carrier nor his agents can resist, or by any vigilance avoid, he is responsible. 1 Smith's L. C. 315; 2 Ohio St. R. 137. The liabilities of a common carrier are thus distinguished into two classes: The one, a liability for losses by neglect, which is the liability of a bailee; the other, a liability for losses by accident, or other unavoidable occurrence, which is the liability of an insurer.'

"And in the more recent case of A. G. S. R. R. v. Quarles, 145 Ala. 430, 40 So. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308, is the following:

"'As a general rule the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them, within a reasonable time, to the consignee. And the contract of carriage is one of insurance against every loss or damage, except such as may be occasioned by the act of God or the public enemy or the fault of the owner of the goods or his agent. And in this state the shipper makes a prima facie case against the carrier when he shows the goods were not delivered, and, in order for the carrier to relieve itself of the absolute liability for their loss as an insurer, it must bring itself within the exception relied upon as an excuse for its failure to deliver.'

"See, also, Boon & Co. v. Steamboat Belfast, 40 Ala. 184, 88 Am. Dec. 761, and Walter v. A. G. S. R. R. Co., 142 Ala. 474, 39 Sou. 87; 4 R. C. L. 696-704.

"While the language of the decisions frequently confine the defenses of a common carrier against its common-law liability to that of loss occasioned by the act of God and the public enemy, yet in fact, as pointed out by this court, there is a third defense—that of loss occasioned by the fault of the owner of the goods or his agent. This is emphasized in the case of McCarthy & Baldwin v. L. & N. R. R. Co., 102 Ala. 193, 14 Sou. 370, 48 Am. St. Rep. 29, where it was said:

"'It is manifest that the case made by the averment of these facts tendered no issue of negligence vel non on the part of the defendant. The contract averred is an unconditional common-law contract of carriage without reservations or exceptions. By its terms the defendant insured the safe delivery of the goods to the consignee, and assumed liability for any loss or injury resulting from any cause except such as afforded, the carrier a defense at common law. The strictest proof of all possible care on the part of the carrier in the transportation and delivery of the goods would have been no defense, and, of course, proof of the carrier's negligence was in no wise essential to a recovery. The defenses, which a carrier under such a contract may interpose to an action for failure to deliver in good condition, are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God, or to the act of a public enemy. But there is in reality a third resting on the fault of the owner of the goods or his agent. This latter defense, while the fault involved in it may consist merely of negligence imputable to the plaintiffs, is in no sense, and bears little analogy to, the defense of contributory negligence, available in actions against common carriers of passengers, some-

times in actions against carriers of live stock, and even, it may be, in actions against carriers of goods—inanimate things—under contracts of affreightment, which limit liability to loss or injury occasioned by the carrier's negligence.'"

Carriers of perishable property, however, are not insurers in the strict sense of the word and are lot liable for damages that may occur as the result of the inherent nature of the goods.

In Higgins & Co. v. C. B. & Q. R. R. (Minn. 1917), 161 N. W. 145, the court said, p. 146:

"Is it the law, as claimed by plaintiff, that a common carrier of perishable freight is an insurer of its delivery at destination in an undamaged condition, and can only escape liability by proving that the damage was caused by the act of God or the public enemy, or that the damage arose out of the inherent nature of the property to decay? Plaintiff insists that this is the common-law rule, and cites Minnesota cases that are claimed to declare it to be the law in this state. 1 Dunnell's Digest, §1323, and cases cited; Presley Fruit Co. v. St. Louis, etc., R. Co., 130 Minn. 121, 153 N. W. 115. In contending that these cases or any cases in this state apply the common-law rule that the carrier is an insurer to shipments of perishable freight, we think plaintiff is mistaken. Our reports are replete with cases announcing and applying the rule that proof of no negligence is a good defense in cases of injury to perishable freight, such as fruit and vegetables. Defendant need not prove that the damage was caused by the natural tendency to decay. It is sufficient to prove that it was not caused by its negligence. The rule that proof of injury while i rier's possession makes a p case of negligence, which n butted, like any other pr case, by proof that the dan not caused by negligence o rier, has been often distin by this court. 1 Dunnell § 1333, and cases cited; Di plement, § 1333, and ca Some of the cases cited s many words that the carr an insurer in the shipment able freight. Brennisen v. vania R. Co., 100 Minn. 1(W. 362, 10 Ann. Cas. 169; Co. v. Ill. Central R. R. Co., 399, 136 N. W. 11. All of ceed on the theory that tl rests on proof of neglig that the prima facie case showing that the injury while the goods were in rier's possession may be r proof that the carrier w fault. We hold that this ru the rule that the carrier i an insurer, applies to the f instant case. But we find n to support such a claim. in our opinion, that if de liable for the condition of it must be on the theory is an absolute liability, i of actual negligence or fa from continuing the shipme fendant's line in the cars they arrived at St. Paul. that this is the law is lar upon the case of Shea v. etc., R. Co., 66 Minn. 102, 608. The facts in the Shea that the defendant carrier the car was unfit for the of lemons when it receive the connecting carrier. It ligent in using such a car.

is not made prominent in the opinion, and while some expressions therein seem to support a rule of absolute liability, it is nevertheless plain, taking the opinion as a phole, that the liability of defendant is predicated upon its actual negligence in the care of the lemons while in its custody. There is no doubt that it is generally correct to say that it is the duty of a carrier to provide safe and suitable vehicles for the transportation of goods intrusted to its care; and that he is not excused from this duty when the goods are received and carried by him in vehicles furnished by a connecting carrier. He adopts and makes such vehicles his own for the purpose of conveying the goods. Hutchinson on Carriers, §§ 498 to 501. The statement of the author in one part of the text that the carrier will be liable for any damage arising from the unfitness of the vehicles for the carriage of the goods should be read in connection with the statement that if the carrier fails to make reasonable inspection of the vehicles he will be deemed guilty of such negligence as will render him liable for any resulting loss. It seems to us that the liability of the carrier who continues a shipment received from a connecting carrier in the cars of the latter should rest on negligence, some fault on its part, as its failure to properly inspect the vehicles before continuing the shipment. It will doubtless be true except in rare instances that the unsuitable character of the car is discoverable on inspection, and this was the fact in the Shea Case and in all the cases we have found that concern the liability of carriers for failure to furnish suitable cars or accepting from other carriers shipments in cars that are defective. In the case at bar the condition that caused the damage was not discoverable. We have been able to find no case like it among the many decisions. We think that the authorities generally recognize that the liability of the carrier for failure to furnish suitable cars, whether the cars be its own or the cars of a connecting carrier which come to it with their freight is not an absolute liability, but only results in case of its failure to exercise due care, skill, or diligence. 5 Thompson on Negligence, § 6591; Moon v. Nor-Pac. Ry. Co., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194. See note to Louisville, etc., R. Co. v. Church, 130 Am. St. Rep., at page 47, where the authorities are collected. The duty of the carrier is that of properly inspecting the cars of other roads that are received by it for transportation. If this duty is performed, or if the defect of one that a proper inspection will not disclose there is no liability."

In an action for damages to a shipment of live stock, the court did not err in refusing an instruction that the carriers were not insurers of the safe delivery of the live stock at any particular time, but were only bound to use ordinary care under the circumstances of the shipment. P. & S. F. Ry. Co. v. Morrison (Tex. 1917), 191 S. W. 138.

A carrier of perishable goods is not an insurer thereof, and is liable only for failure to use ordinary care in preserving them from injury while en route. Fish v. Seabord Air Line Ry., 163 N. Y. S. 439.

Where the initial carrier wrongfully refuses to permit a caretaker to accompany a shipment of live stock, evidence relative to such refusal is admissible to explain the shipper's

failure to do so. C., I. & L. Ry. v. Priddy (Ind. 1917), 115 N. E. 266.

The carrier is liable in an action of negligence to any person who has a special property in the case and in case of joint ownership is liable to both owners. Where a railroad sold to one of two joint owners of hunting dogs authorized to act for the other, tickets for the transportation of the party and their dogs, it was liable to both owners for loss or injury of such dogs. Louisville & N. Ry. Co. v. Dickson (Ala. 1917), 73 So. 750.

In an action for death by poisoning of hunting dogs checked with carrier, an instruction for defendant in case servants of plaintiff were left in charge, with instructions to look after the dogs after their delivery to the carriers, was properly refused, as relieving the carrier from duty notwithstanding its servants were negligent in respect to the protection of its custody. Louisville & N. Ry. Co. v. Dickson (Ala. 1917), 73 So. 750.

At common law the breach of a joint contract between two railroad companies for through transportation of freight renders both liable for the damages which result on either road unless there is a valid provision limiting the liability of each to injury occurring on its own line. Gulf, C. & S. F. Ry. Co. v. Nelson (Tex. 1917), 19 S. E. 1056.

A. C. L. Ry. Co. v. Enterprise Cotton Oil Co (Ala. 1917), 74 So. 232.

In an action for damages to shipment of sewer pipe, evidence that it was shipped properly packed and in good condition, that it is not broken by ordinarily careful handling, and that upon arrival approximately one-third of the pipe was broken, held evidence of negligence by the carrier. Blackmen & Post Pipe Co. v. M. & O. R. Co. (Mo. 1917), 190 S. W. 1032.

Where defendant railroad proved plaintiff delivered mare to it in damaged condition, burden then rested upon plaintiff to show defendants' negligence in handling the defective animal. Jones v. Galveston, H. & S. A. Ry. Co. (Tex. 1917), 193 S. W. 373.

Where plaintiff contracted to transport defendant's ties by water, it was its duty to take such steps as ordinary prudence would suggest to preserve the goods, and for such services not necessitated by its own negligence, plaintiff could recover. Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co. (Mo. 1917), 191 S. W. 1026.

Notwithstanding the federal statute relating to interstate shipments, carriers may, by contract, limit and define the extent of their liability for interstate shipments, but they cannot relieve themselves from liability for damages caused by their negligence or the negligence of their employes. Chesapeake & O. Ry. Co. of Indiana v. Jordan, 114 N. E. (Ind. 1916), 461.

The claimant delivered to the N. C. & St. L. Ry. at Shelbyville, Ind., 28 mules, in good condition, for Huntington, Ind. The initial carrier refused to permit a caretaker to accompany the mules, although he offered to purchase a ticket for that purpose. The mules arrived at New Alband, Ind., at 1:30 p. m. February 2, 1907, in good condition and were there delivered to the C. I. & L. They arrived at Bloomington, Ind., about 11 p. m. They were unloaded, given hay and water, and reloaded about 7:30 a. m. the following morning.

common law, a carrier for hire is an insurer of safe delivery, and the shipper has the right of action against each carrier in the thru line in turn for the damage occurring upon its division, but not for that occurring upon a line of a predecessor or successor in the route.[4] Of course, under the Carmack Amendment (Sec. 20) to the Interstate Commerce Act, which furnishes the sole guide to the liability of a common carrier for damage to an interstate shipment, the initial carrier is liable to the owner for any default or negligence of a connecting carrier.[5] A seizure of a shipment of poultry on a connecting line, by military authorities in a flood district under martial law, to relieve sufferers, if done solely by reason of the invitation of the connecting line, when it could have delivered the shipment by the exercise of ordinary care, renders the initial carrier liable.[5a] However, nothing really can be added to the most excellent discussion of the liability of carriers

and arrived at Lafayette at about 5 p. m. the same day, taken to the stockyards, unloaded and placed in open pens, without covering, where they remained until 9:30 a. m. the following day, at which time they were again loaded and remained in the yards of the company until 2:30 p. m. and then delivered to Wabash Company. It appeared that they had not been properly fed for a period of two days prior to their arrival at Huntington. When unloaded one of the mules was dead and another so weak it could not walk without assistance and all of them were suffering from lack of food or were starved and gaunt. A reasonable schedule from New Albany to Huntington, Ind., would have been thirty-one hours. The bill of lading provided that the shipper would load and unload the stock at his own risk, and feed and water and attend the same at his own expense, and also that in case of injury he would give notice of claim before the stock was removed or mingled with others. *Held* though a carrier may contract for the shipper to accompany and care for such stock, it cannot thereby relieve itself, or any connecting carrier, from its or their negligent failure to perform such duty, and, to the extent that any provision of a special contract would attempt to relieve the carrier from such a liability, it would be invalid and void and that the carrier was in no position to urge as an excuse for its failure to perform the duty of looking after and caring for the stock and as evidence of its reasonable and ordinary care in such respect, that such duty was assumed by the shippers whom it had expressly refused to permit to accompany the stock. Chicago, I. & L. Ry. v. Priddy (Ind. 1917), 115 N. E. 266.

4. Southern Ry. Co. v. Avey (Ky. 1917), 191 S. W. 460.

5. See Infra, *Initial Carrier*.

5a. Chicago & E. I. R. Co. v. Collins Produce Co., 39 Sup. Ct. 189.

contained in the decision of the Interstate Commerce Commission prescribing the provisions in the new bill of lading, and which we take the liberty of quoting at length (52 I. C. C. 677, 679, 682).

—"**Liability of Common Carriers Under the Common Law.** —In the celebrated case of Coggs v. Bernard, 2 Lord Raymond, 909; 1 Smith's Leading Cases, 369, Lord Holt, in quaint language, states the common-law liability of carriers as of that time to be that if 'a delivery to carry or otherwise manage, * * * ' is made 'to one that exercises a public employment, * * * and he is to have a reward, he is bound to answer for the goods at all events. * * * The law charges this person thus intrusted to carry goods, against all events, but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of ondoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point.' Under the common law as it has been developed to the present day in its application to modern transportation conditions and practices, there has been little or no relaxation of the rigor of the rule of the common carrier's liability, but the exceptions have been extended to include loss, damage, and injury due to other causes, and a common carrier is now regarded as an insurer of the goods intrusted to its care and custody for transportation and as liable for all loss, damage, or injury occurring to the goods while they are held by it in its capacity of a common carrier, except when such loss, damage, or injury is caused by: (a) the act of God; (b) the public enemy; (c) the act of the shipper himself; (d) public authority; (e) or the inherent vice or nature of the goods. Generally a common carrier can not, under the common law, exempt itself from the consequences of its own negligence or willful act at any time or under any circumstances in the handling of goods and, therefore, even when loss

is occasioned by or results from one of the excepted perils against which it is not otherwise held as an insurer, it will nevertheless be liable for any failure to use the degree of care that would have prevented or minimized losses resulting from the excepted causes. This liability of common carriers as insurers of the goods they transport is thus shown to inhere in the peculiar relationship of existing between the carrier and the shipper. The increase in the amount of business done by carriers, the extension of their operations, and the increase in the value of personal property carried from place to place within the United Kingdom, made the degree of the carrier's liability a matter of much concern to carriers in England and they began to contrive ways of diminishing it. In the effort to achieve this end it became the custom of carriers to post notices in public places to the effect that they would not assume liability in excess of specified values for goods unless the owner should pay a higher rate in consideration thereof. It was the theory that if such a notice were brought home to the shipper in such manner that he had knowledge of it, it thereby became a part of the contract of shipment and binding upon him. The English courts of law very early began to give official recognition to the rights claimed by common carriers to thus restrict their common-law liability and it was first held that even so lax a method as the publishing and posting in public places of notices to that intent and purpose would be sufficient to effect the limitation of the carrier's liability when such notices were brought home to the shipper. The custom, sanctioned by law, which thus grew up in England, was productive of so many evils that in 1854 the Parliament intervened and enacted the railway and canal traffic act. After the enactment of that statute common carriers in England could limit their common-law liability only by a contract with the shipper. In this country, however, the rule was early established that a limitation of the carrier's liability could be effected only by the establishment of a contractual relationship between the carrier and shipper and that a notice of limitation of liability such as was at one time recognized by the English courts was ineffectual and could not be relied upon as a defense in an action for recovery on account of loss or damage to the goods unless the shipper first had notice of the terms and assented to them.

Once assented to by the shipper a contract was assumed to be created that would be binding upon him. The form of such an assent is now commonly secured by the giving and accepting of a written bill of lading, assent on the part of the shipper being presumed even though, as is unquestionably the fact, he seldom reads and is, perhaps, actually ignorant of the conditions. So, the law is now well settled, both in this country and in England, that a carrier may, unless forbidden by statute, limit or restrict, or even extend and enlarge, its common-law liability. Such contracts must, however, be invested with all the requirements of validity attaching to other forms of contract. Mutual assent and a valuable consideration must exist to support the assumption by the carrier of more than its common-law risks or, on the other hand, to support a restriction or limitation of those risks. A consideration for the latter is usually found in the agreement by the carrier to apply a lower or, as it is expressed in the governing freight classifications in effect in this country, 'reduced rate; and this is a sufficient consideration.' "

—"**Liability of Common Carriers Under the Federal Statutes.** —"Congress has enacted several statutes in recent years which affect bills of lading in various respects. Except the Harter act, approved July 1, 1893, which applied only to carriers by water, and to which reference will be made later, the first of these was the Carmack amendment to section 20 of the act to regulate commerce, approved June 29, 1906, 34 Stat. L., 595, the material provisions of which read as follows: That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Prior to the adoption of this amendment the liability of common carriers was determined by the common law or the statutes of the different states. A usual provision incorporated in bills of lading then in use was one which provided that no carrier should be liable for any loss or damage not occurring on its own line. Under this limitation an initial carrier was not liable at common law for loss or damage through the fault of the connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. Each succeeding carrier was the agent of the shipper for the continuance of the transportation. The shipper, or claimant, in an action for recovery on account of loss or damage, was therefore subjected to the inconvenience of ascertaining upon which one of several lines in the through route the loss or damage occurred. This was often impossible of definite ascertainment, and, therefore, a serious handicap to the shipper in the prosecution of his suit. The effect of the Carmack amendment was to hold the initial carrier 'receiving property for transportation from a point in one state to a point in another state, as having contracted for through carriage to the point of destination, using the lines of its connecting carriers as its agents. The amendment took away from such initial carrier its former right to make a contract limiting its liability to loss or damage occuring on its own line, and thus relieved the shipping public of the burden theretofore imposed upon it of proving the particular carrier upon whose line the loss or damage occurred. Atlantic Coast Line v. Riverside Mills, 219 U. S., 186. The carrier was prohibited from mitigating or escaping the duties and liabilities imposed upon it by the amendment by any contract, receipt, rule, or regulation which it might make, or attempt to make, with the shipper. Prior to the decision in the Croninger Case, supra, there had been much conflict in the decisions, both of the federal and state courts, upon the question of validity of conditions in bills of lading which limited or sought to limit the amount of the carrier's liability for loss, damage, and injury to goods transported. The proviso in the amendment had been construed by both federal and state courts to preserve to the shipper the remedies then existing under state laws when the latter were more advantageous to him than the remedy provided by federal

law, and so the rules were interpreted differently according to the jurisdiction in which the case arose. The Croninger Case held that it was the purpose of Congress to assume jurisdiction in the fixing of the carrier's liability upon interstate shipments, and thereafter such questions were generally construed in the light of the decision in that case, in which it was held that a contract for transportation containing a stipulation of value to which the carrier's liability was sought to be limited was valid and not in violation of the provision of the act. On March 4, 1915, Congress enacted the first Cummins amendment, so called, which became effective June 2, 1915, 38 Stat. L., 1196. It extended the territorial application of the provisions of the Carmack amendment to the transportation of goods within the territories of the United States, the District of Columbia, or to goods exported to adjacent foreign countries, and also fixed, definitely and rigidly, the liability of the common carrier by a provision making the carrier liable for the full actual loss, damage, or injury caused by it or any of its connections to the goods transported by it, 'notwithstanding any limitations of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void.' That amendment provided, however, for a bona fide declaration of value, which was binding upon both parties under the following conditions: Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided, further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which

he has under the existing law. Notwithstanding the evident purpose of that amendment to invalidate all limitations or attempted limitations of liability of carriers for loss, damage, or injury caused by them, there was much diversity of opinion as to its effect upon rates and upon bill of lading provisions which were at the time in force and effect as published in tariffs on file with the Commission. In response to numerous and urgent requests the Commission conducted an inquiry into some phases of the subject and in its reports, The Cummins Amendment, 33 I. C. C., 682, expressed its views, tentatively, upon some of the matters and things presented. It found that there was necessity for revision of bills of lading, live-stock contracts, and other similar contracts of carriage, as well as of the classifications and rate schedules; that bills of lading and live-stock contracts ought to be at once amended by eliminating obviously unlawful and invalid provisions, and permission was given to make such changes effective upon less than statutory notice. The expression of the Commission's views upon these matters was made with the express reservation that the questions were subject to judicial interpretation and that its views might be somewhat changed in the light of later developments and more complete information. By the second Cummins amendment, 39 Stat. L., 441, effective August 9, 1916, the proviso of the first amendment relating to goods hidden from view by wrapping, boxing, etc., was eliminated and the following language substituted in place thereof: That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, * * * to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far

as relates to values, be held to be a violation of section ten [illegible] this Act to regulate commerce, as amended; and any tariff sche[illegible]ule which may be filed with the Commission pursuant to su[illegible] order shall contain specific reference thereto and may establi[illegible] rates varying with the value so declared or agreed upon; a[illegible] the Commission is hereby empowered to make such order cases where rates dependent upon and varying with declared agreed values would, in its opinion, be just and reasonable un[illegible] the circumstances and conditions surrounding the transpor[illegible]tion. The term "ordinary live stock" shall include all cat[illegible] swine, sheep, goats, horses, and mules, except such as are chie[illegible] valuable for breeding, racing, show purposes, or other spe[illegible]i uses. The effect of the latter amendment is to permit limitati[illegible] of liability, or the amount of recovery, and the establishm[illegible]e and maintenance, under the prescribed conditions, of rates d[illegible] pendent upon values declared in writing by the shipper, [illegible] agreed upon in writing as the released value of the proper[illegible] in respect of all property except "ordinary live stock," whic[illegible] as explained in the amendment, is still subject to the rigoro[illegible] inhibitions against limitations of the carrier's liability contain[illegible] in the first Cummins amendment. These conditions, as th[illegible] affect live stock, will be discussed later in a supplemental rep[illegible] dealing with the live-stock contract or bill of lading. With r[illegible] spect to all property other than ordinary livestock, unless t[illegible] carrier shall have been or shall be expressly authorized or r[illegible] quired by the Commission to establish and maintain rates d[illegible] pendent upon a written declaration or agreement as to val[illegible] the provisions of the first Cummins amendment are still appl able. That rates dependent upon value may be permitted a that the parties may be free to make declarations or agreeme[illegible] in respect of the value of goods; it is provided that such d[illegible] larations or agreements shall have no other effect than to li[illegible] liability and recovery to an amount not exceeding the va[illegible] stated and shall not be deemed to be in violation of section 10 of the act." An important question that the Commission had to decide was when did the liability of the carrier as an insurer begin and when did it end. The Commission said, p. 716: "The liability of a railroad company as a common carrier continues after the arrival of the goods in a freight yard at the city of their

stination until they have been placed at the disposal of the onsignee, through the bill of lading provides that the carrier hall not be liable after the arrival of the goods at their destintion. Liverpool & L. & G. Ins. Co. v. M'Neill, 89 Fed., 131. Notwithstanding such a provision in the bill of lading, public olicy has been held to so modify the contract as to give the onsignee a reasonable time within which to remove the goods fter arrival before the carrier's liabiilty as such ceases. Tallasee Falls Mfg. Co. v. Western Ry. of Alabama, 129 Ala., 167."[5½]

5½. In discussing the same general question with reference to specific provisions in the proposed bill of lading the Commission said (52 I. C. C., p. 95):

Section 1, clause 3, liability of carrier as insurer and warehouseman for loss, damage, or delay caused by fire.—Three proposals of the carriers which are contained in the proposed bill relate, in whole or in part, to warehousing and storage of goods; that is, to the distinctions in the degree of the carrier's liability and obligation as an insurer of the goods on the one hand, and that of a mere bailee or warehouseman on the other after the goods have arrived at destination and are still in its possession; or while they may be held in transit upon proper request of the shipper or owner. Indeed, it is upon this important question, i. e., the degree or character of the carrier's responsibility, that the greatest conflict of interest between the shipper and carrier occurs. The shippers earnestly oppose the carriers' proposals, which are related in principle and as to the present time constitute, with some years past have constituted conditions in the uniform and standard bills of lading. The proposals are found in section 1, clauses 3 and 4, and section 4, clause 1, of the proposed bill, and will be considered in the order, which they appear in the proposed bill.

The first proposal, as expressed in section 1, clause 3, with respect to the carrier or party in possession of the property, is that—

"for loss, damage, or delay caused by fire occurring after 48 hours (exclusive of Sundays and legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

At the conference between the shippers' and carriers' representatives the shippers objected to this provision and proposed in lieu thereof the following phraseology, to wit, "The liability of the carrier as a common carrier shall terminate at such time as is provided or determined by law."

Reduced to its simplest terms the question at issue here is: At what time in case of loss, damage, or injury caused by fire, shall the carrier's liability as an insurer of the goods transported by it be deemed to have ceased and its liability have been reduced to that of a warehouseman only? The answer involves some preliminary study of the carrier's liability in connection with its duty to

transport and deliver. The common-law liability of the carrier attaches at the time of delivery to and acceptance by it of the goods for immediate transportation. 1 Hutch. Carr. (3d Ed.), § 112. The duty to make delivery to the consignee of the goods transported is an essential part of the carrier's obligation whether expressed in the contract or not. The question when its liability as a carrier terminates and that of warehouseman begins is an exceptionally important one and presents many delicate phases. A valid delivery involves, according to the authorities, four requisites, viz: Delivery, (1) to the right person, (2) at a reasonable time, (3) at the proper place, and (4) in a proper manner. 2 Hutch. Carr. (3d Ed.), §§ 662-664.

The bills of lading act contains no provision respecting transition from liability of a common carrier to that of a warehouseman. Questions of this nature arising in connection with interstate shipments moving under bills of lading issued pursuant to the act to regulate commerce are necessarily federal questions and the question as to responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of general principles of the common law. Southern Ry. v. Prescott, 240 U. S., 632, citing Adams Express Co. v. Croninger, *supra*.

In this country there is no uniformly accepted rule determinative of the question as to when the carrier's extraordinary liability ceases and that of a mere warehouseman is substituted, except in the case of carriers by water. The rule as to the latter is that after arrival of the goods the carrier must give the consignee actual, not constructive, notic arrival, and also give him able time within which to r goods. What constitutes able time for the remov goods is a question of fact, termined by the particula stances of the case. In resp carriers three different r been evolved, familiarly kn Massachusetts, New Hamp New York rules. The lat has been adopted and ap number of states, is som ferred to as the Michigan der the Massachusetts rul bility of the carrier as an the goods ends when the g arrived at their destination without notice to the consi been safely deposited upo form or in the warehouse minal carrier. 2 Hutch. Ed.), § 701, citing Norw Co. v. R. R. Co., 1 Gray, the New Hampshire rule ca bility ends when the good rived at destination and a time during which they n been removed by the con elapsed. Under neither t chusetts nor New Hampsh actual notice required. 2 H (3d Ed.), § 704, citing Mo Railroad, 32 N. H., 523. B York rule, if the consignee upon the arrival of the goo take them without unreas lay; if he is not present, b or in the immediate vicin place of delivery, the ca notify him of the arriv goods, and then he must h onable time in which to rer If, after a bona fide effo notice of the arrival of th the consignee named, such

does not appear and remove them within a reasonable time, he can not hold the carrier longer as an insurer. If he is absent, unknown, or can not be found, the carrier may store them. 2 Hutch. Carr. (3d Ed.), § 708, citing Fenner v. Railroad, 44 N. Y., 505, and other cases.

The New York rule is also the law of England and of Canada. Mitchell v. The Railway Co., 10 L. R. Q. B., 256; Chapman v. Great Western Ry. Co., 5 Q. B. D., 278; Richardson v. Canadian Pacific R. Co., 19 Ont. R., 369. It is, in effect, the same as that applicable to water carriers. Its distinctive feature is the requirement of actual notice to the party entitled thereto of the arrival of the goods, unless, after diligent effort so to do, the carrier, because of the death of the consignee, or of inability to learn his address, is unable to serve him with notice. The New York rule is obviously the more just one, since, under all the varying conditions of rail transportation of today, it is as impracticable for the consignee to anticipate the day and hour of arrival of trains, or the probable time of placement of cars, or tender of delivery, as it was for the consignee of goods transported by water to anticipate the time of arrival of the ship bearing his goods.

The carriers contend: (1) That the common-law rule upon the question of the difference in liability with respect to carrier and warehouseman has not been abridged or in any way affected by federal legislation; (2) that the rule proposed does not offend against either public policy or the interstate commerce act; (3) that the length of time given after notice more than meets the common-law rule of reasonableness; (4) that the definite form of the wording meets the requirement that the privilege be clearly specified; (5) that the shippers' proposal puts the question of liability back in the same situation that existed prior to the passage of the Carmack amendment and invokes the same uncertainty and lack of uniformity which the Carmack amendment was especially designed to avoid; and, (6) that the act gives the Commission no power to impose upon carriers a heavier liability than may be found in the statute and under the common law.

The shipper's opposition to the carriers' proposal is predicted upon the following grounds, chiefly: (1) That a rule terminating the carrier's liability after 48 hours after the giving or sending of notice of arrival at destination would inevitably result in many instances of injustice; (2) that the provision would terminate the carrier's liability as such by the giving of notice even though, in the case of a carload shipment, the car were not placed and might not be placed for delivery within 48 hours after the giving or sending of notice of arrival; and (3) that in case of some commodities the free time under demurrage regulations for the unloading of carload shipments is more than 48 hours and that, therefore, the carrier's liability ought to extend through the time during which it is obligated, under tariff provisions, to hold the car for unloading by the shipper free of demurrage.

Upon broader grounds, more particularly in connection with the proposed provision designated as section 4, clause 1, *infra*, but upon grounds which it will be quite as appropriate to discuss here, the shippers contend against any limitation of the car-

rier's liability. It is urged upon brief in behalf of one group of shippers that "any service performed by the carrier is 'transportation' and that the liability of the carrier is that of a common carrier throughout the time the property is the subject of transportation as defined in the first section of the act to regulate commerce." * * * 'That since storage and delivery are a part of transportation the carrier must be liable throughout the course of the property (transportation?) as a common carrier. The act to regulate commerce deals only with common carriers. The Commission should not permit the carrier to limit its liability to negligence, only, while property is in storage.'

"In behalf of another group of shippers it is urged (1) that property in possession of the carrier does not receive what can properly be termed a warehouse service; that the carrier can not leave the goods in the car, no matter how long the time, and claim warehouseman liability; that the warehouseman service must be actually given after the reasonable time for removal has expired; that when goods arrive at destination and are held in a vessel, car, depot, or place of delivery they are still receiving transportation service; (2) that such a holding of property is a part of the service that must be rendered in connection with the delivery, and is performed by the carrier as a common-carrier service; (3) that to restrict the carrier's liability to that of a warehouseman, only, when it does not render such a service would deprive the shipper of the benefit of the liability which the character of the service requires and would be a penalty of unnecessary and unreasonable severity for the failure to remove erty at the expiration of 48 failure for which the dem rules already provide a sufficie alty; (4) that until the prop received or until such time should reasonably be remove shipper is entitled to demand tl carrier shall exercise the sam gence and be responsible to the extent for property in its poss (5) It is not claimed that th rier should be held to the liabi a common carrier for goods possession awaiting delivery nitely. The shippers express nc ion as to when would be reas time during which the carrier be required to continue its hi gree of liability, but say merel the law now prescribes that lapse of a reasonable time for moval of the goods the carrie sponsibility as a common ceases and it becomes liable warehouseman only; that wha stitutes a reasonable time m determined from all the c stances and conditions affectin particular shipment; that it possible to fix an arbitrary ti take the place of the reasonabl prescribed by law without re in many cases of individual ship.

These arguments are appa based upon a construction c terminology of section 1 of t to regulate commerce and of t cisions of the Supreme Court United States touching the ca liability in respect of goods r ing in its custody after arriv

In Cleveland & St. Louis Dettlebach, 239 U. S., 588, the tion, as stated by the court "Whether the limitation of l

(under which a shipment of household goods had been received and transported) may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman." The lower court had held to the contrary, reasoning that the limitation of the amount of the carrier's liability provided for in the bill of lading inured only to the benefit of the carrier as such and that the consideration of a reduced rate which supported the transportation contract could not be carried over as to operate as a limitation of the amount of the carrier's liability in its capacity of warehouseman, but the Supreme Court ruled that the shipment having been made under an express contract made for the purpose of interstate transportation, such a contract must be determined in the light of the act to regulate commerce.

Discussing the language of section 1 of the act the court held that the term "transportation" included all services of the carrier in connection with the shipment, including storage of goods after arrival at destination. The court said:

From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the term 'transportation' and subjected to the provisions of the act respecting reasonable rates and the like.

"The court's decision related only to the question indicated, viz, whether the *limitation of the amount* of liability provided for in the bill of lading had "spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman." The decision has no bearing upon the question as to *when*, or under what circumstances, the liability of the carrier, as such, ceases and that of warehouseman begins.

Shortly after this decision was rendered the case of the Southern Ry. v. Prescott, *supra*, came before the Supreme Court on error to the supreme court of the state of South Carolina. That case involved the liability of the carrier of an interstate shipment as warehouseman of the goods after their arrival at destination. One of the stipulations of the bill of lading, substantially the same as that which we are here considering, was that "property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of arrival" might be kept in car, depot, or warehouse, "subject to reasonable charge for storage and carrier's liability as warehouseman only." After arrival of the goods the consignee paid the entire freight charges and took away 4 of the 13 packages constituting the shipment. The company's agent consented that 9 packages might remain to meet the consignee's convenience in removal. Before they were called for the carrier's warehouse, with its contents, including the 9 undelivered pack-

ages, was destroyed by fire. The Supreme Court held that "transportation" as defined in the act includes the service of the carrier as warehouseman and that the retention of the part of the shipment in question was a terminal service forming part of the transportation service in the sense of, and governed by, the act to regulate commerce and that the carrier was liable for negligence only.

The duties of the carrier and the shipper in respect to the delivery of goods are reciprocal. The circumstances and conditions attending the delivery of freight at terminals in the large cities, and even from the depots of carriers in the smaller communities, are such that it is not only impossible for the shipper to anticipate the arrival of his goods and be there to receive them, but also it would be equally disadvantageous to the carriers, whose facilities for the receiving and handling of freight are so congested and inadequate in many communities that much time and thought on the part of transportation companies, public commissions, and regulatory bodies are being devoted to the solution or amelioration of such conditions.

The common-law rule varies in this country, as we have seen, there being three different applications, each in different jurisdictions. It might be argued, therefore, that any order issued by this Commission would have the effect of changing the rule in one or more of these jurisdictions and would be beyond the authority of this Commission as being an attempted exercise of legislative functions not specifically delegated to it by Congress. We think no such question of our jurisdiction could be seriously raised upon the ground stated. Though perhaps mixed with the qu tion of the common-law rule, it primarily an administrative questi What we are really dealing with certain rules, regulations, and pr tices of the carriers, viz, those u which the question of the terminati of the carrier's liability as su would cease under the law and liability as a warehouseman wou begin. The primary question is o of fact and as an administrative ma ter it is both desirable and proper, order that unnecessary controver may be avoided, that a reasonabl rule should be adopted for the d termination of this question. A practical matter, it is not only esse tial that the shipper should have n tice of the arrival of his goods, b that the carrier should place them an accessible position to be receiv by him and removed. Until they so placed and tendered for deliv it is obviously impossible for the c signee to receive and remove th and the carrier can not reasonably relieved of its common-law liabi until it has so placed or tendered goods for delivery. If the consig or other party upon whom is the r to receive the goods, does not rem them within a reasonable time th after, the carrier's common-law bility should cease and become t of a warehouseman only. The c signee should have a reasonable ti within which to remove the goo after notice has been duly received o given that they are *ready for deliv ery*, and the carrier's notice to the shipper should be one which not only notifies him of the arrival of the goods, but also that they are ready for delivery, or that, in the case of a carload shipment, the car has been placed at a designated place for de-

r that the carrier awaits or-
pecting its placement or de-
This, in substance, is the com-
and the established practice
irriers even in those jurisdic-
ere, under the strict applica-
the Massachusetts and New
ire rules, they might not be
to give notice."

ommission continued, p. 704:
have already discussed the
of the termination of the
liability as an insurer of the
ter arrival at destination, and
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h until property has been de-
to it for immediate trans-
n. When goods are merely
d to a carrier or deposited
arehouse and are not to be
ted until further orders from
ier, the carrier's liability is
a warehouseman or bailee
ilson v. International Ry Co.,
., 367; Louisville & Nashville
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Superadded to these risks are
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stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing of the goods under such circumstances should be held to be a mere incident to the transportation, and they should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route. McDonald v. The Railroad, 34 N. Y., 497; see also Lewis v. Chesapeake & O. Ry. Co., 47 W. Va., 656; Southard v. Minneapolis, St. P. & S. S. M. Ry. Co., 60 Minn., 382.

It is otherwise, however, when the holding is at the instance of the owner of the goods and in the exercise of a right on his part, for then the carrier is placed in a different position with respect to the goods, and the circumstances of the case may divest the carrier of the high degree of responsibility which rests upon it while the goods are in its possession and in course of transportation. Under these circumstances the carrier, it is true, still has the goods in its custody, but the transportation which has been interrupted and interfered with by the owner can not be continued until further orders have been received from the owner. The carrier's function as a transportation agent is suspended for an indefinite, and often a long, period of time. "Thus where the goods have been delivered to the railroad company for shipment, and they were loaded upon its cars for that purpose and were about to be started, but the company was then requested by the owner to wait until he could see the party to whom he had sold them, which request was complied

with; and the next day the goods, while being so detained, caught fire and were damaged, it was held that from the moment the request was made to detain the goods the liability of the company was as a warehouseman only." 1 Hutch. Carr. (3d Ed.), § 113; St. L., A. & T. H. R. R. Co. v. Montgomery, *supra.*

The same principle, it would seem, should apply when, upon orders of the owner, property is stopped and held in transit pending further orders from the owner. The holding at the owner's order is not accessory to the transortation. The precise point at which the goods may be stopped and held, that is, whether in terminal yards or warehouse of the carrier, or at an intermediate point on the line of transportation, is immaterial.

From our study of the question we think that even in the absence of express stipulation the carrier's liability, under the circumstances contemplated, would be that of warehouseman, only, while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request.

Although the matter is not brought in issue, we are not satisfied with the carrier's claim of exemption, which is included in this clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for "delay caused by riots or strikes," as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable.

We conclude, therefore, that the stipulation proposed by the carriers is in accord with the law and is just and reasonable. It is therefore approved."

In discussing more specifically the carrier's liability as a warehouseman, the Commission said, p. 712:

"*Section 4, clause 1, general liability of carrier as warehouseman after 48 hours.*—This clause is the third in the trio of provisions in the proposed conditions which seek to limit the carrier's liability to that of warehouseman while the property is still in its possession. (See discussion of section 1, clause 3 and 4, *ante.*) The provision reads as follows:

"Property not removed by the party entitled to receive it within 48 hours (exclusive of Sundays and legal holidays), after notice of its arrival has been duly sent or given, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. Nothing in this paragraph shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage."

Similar or identical provisions have for several years been incorporated in the uniform and standard forms of bills of lading. The carriers wish to retain it, but the shippers propose that the provision be eliminated without substitution.

Upon analysis, it will be observed that the provision contains three distinct propositions: (1) That, subject to different provisions of local rules or law, the free time for delivery or removal of proprety shall be limited to 48 hours after *notice of arrival* has been duly sent or given; (2) that after the expiration of that time the property may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, etc., subject to established charges for storage and liability of the carrier as warehouseman only; or, (3) may, at the option of the carrier, be stored in a public or licensed warehouse at the place of delivery or other available place at the owner's risk and cost, and without liability on the part of the carrier, and subject to a lien for freight and other lawful charges, including storage.

With respect to the first proposition, it is scarcely necessary to do more than direct attention to the nature of the criticism against the somewhat similar provision of section 1, clause 3, considered in a prior part of this report, respecting the carrier's proposal to limit the liability to that of a warehouseman "after 48 hours * * * after notice of the arrival of the property at destination has been duly sent or given." The same considerations which have seemed to us to require a modification of the phraseology of that rule apply here as well, viz., the consignee should have the benefit of the 48 hours free time after *tender* of the property for delivery, or, in the case of a carload shipment, after notice that the car has been *actually placed* at the accustomed place of delivery or is *held subject* to the owner's orders for disposition, and subject, moreover, to any provisions of lawfully filed tariffs that may permit a longer time in individual cases, or with respect to particular commodities.

So, in respect to the proposition to reduce the carrier's liability to that of a warehouseman only, after tender, or reasonable effort to effect delivery of the property has been made by the carrier, the fundamental governing principles which have been considered in connection with the provision in section 1, clause 3, discussed, *ante*, control here.

One particular objection to the clause here considered is laid against the phraseology of the provision that in the event of nondelivery after specified time the property may, at the option of the carrier, be stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, "and there held at the owner's risk and," etc. It is urged in behalf of some of the shippers that if the entire paragraph is not eliminated that at least the words "at the owner's risk and" should be eliminated, leaving the wording to read "and there held without liabilty on the part of the carrier." It is urged that this be done because there is at least a possibility that it might be held, under the terms of the provision, that the public or licensed warehouse in which the goods are stored incurs no liability whatsoever, even as a warehouseman, although its regular storage rates are being paid by the shipper or consignee.

We think this objection is well taken. As stated upon brief by the shippers, 'clearly the purpose of the phrase above quoted is only to relieve the carrier from liability where

It must be remembered, however, that negligence is a question of law and fact. The question whether a particular act has been performed or omitted, being one of fact, and the question whether its performance was a breach of legal duty one of law.[6] Thus in an action for delay in transit, the question as to whether the carrier did delay is one of fact, but the question as to whether it had a right to delay the shipment is one of law. Generally speaking, therefore, 'negligence' is the failure to perform some act required by law.[7] It is not necessary in an action against a carrier, unless it is a connecting carrier, to show that the goods were lost or damaged through any act of the carrier.[8] Under the common law, a prima facie case against a carrier for loss or damages to goods shipped, is made by showing the delivery to the carrier in good condition and properly packed and subsequent delivery after transformation in bad condition.[9] So where a carrier accepts uninjured cattle for shipment and de-

the goods are sent to a public or licensed warehouse, and there is obviously no reason why the carrier should include in its bill of lading a phrase which may be construed as relieving the public or licensed warehouse from any responsibility whatsoever for the safe-keeping of the goods.'

The rule can not be approved in the forms proposed by the carriers. In lieu thereof, we are of the opinion that a rule phrased as follows would be just and reasonable.

" 'Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or, at the option of the carrier, may be stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.' "

6. New York & Porto Rico S. S. Co. v. Guanica Centrale, 231 Fed. 820.

7. New York & Porto Rico S. S. Co. v. Guanica Centrale, 231 Fed. 820.

8. C. & E. I. R. R. Co. v. Collins Produce Co., 235 Fed. 857.

9. Cudahy Packing Co. v. A. T. & S. F. Ry. Co. (Mo. 1916), 187 S. W. 149.

livers them injured, its negligence is presumed.[10] But in such case nonliability of the carrier because of negligence of the shipper was not established by mere proof that the cattle when shipped were securely tied by the shipper, and while in the exclusive charge of the carrier became untied, since this did not show negligence of the shipper, and, if it had, there was no proof that such negligence caused the damage.[11] And in an action against a carrier for damage to a shipment, the claimant has the initial burden of showing that he delivered the goods to the carrier in good condition properly prepared for shipment.[12] And upon proof of receipt by the carrier of goods in good condition, issuance of bill of lading therefor, and subsequent damaged condition, the burden is upon the carrier to show the transit of the goods had terminated prior to the damage complained of.[13] Neither does the Carmack Amendment, declaring that the initial carrier shall be liable to the lawful holder of the bill of lading or receipt for any loss, damage, or injury caused by it or by any connecting carrier, impose upon the shipper the burden of establishing, in a suit against the initial carrier, that the loss was in fact caused by the initial or connecting carrier, but merely extends the common-law liability of the initial carrier to all losses, whether occurring on its line or that of a connecting carrier.[14] But on a shipment of cattle, where the shipper

10. San Antonio & A. P. Ry. Co. v. Jackson & Allen (Tex. 1916), 187 S. W. 488.

11. San Antonio & A. P. Ry. Co. v. Jackson & Allen (Tex. 1916), 187 S. W. 488.

12. Cudahy Packing Co. v. A. T. & S. F. Ry. Co. (Mo. 1916), 187 S. W. 149.

13. St. L., I. M. & S. Ry. v. Cunningham Commission Co. (Ark. 1916), 188 S. W. 1177.

In an action for the value of 30 bales of cotton destroyed by fire, upon establishment of the plaintiffs' prima facie case that the cotton was destroyed while in the defendant's possession under a bill of lading, the burden was on defendant to show freedom from negligence. Texas & P. Ry. Co. v. R. W. Williamson & Co. (Tex. 1916), 187 S. W. 354.

14. Chicago & E. I. R. Co. v. Collins Produce Co., 235 Fed. 857

In an action upon the case for damages against a railroad company for negligently injuring the plaintiff's live stock during transportation, a prima facie case is made for the plaintiff when he shows the delivery of the stock to the railroad in good condition, delivery by the railroad company at the point of destination

accompanies them, and, under a special contract, assumes the specific duty to care for them, and the cattle are injured by lack of feed and water, the burden is upon the shipper to show negligence.[15] The rule may therefore be stated, that where goods are lost by a common carrier in transit, the carrier has the burden of showing that the loss resulted from some cause for which the carrier was not responsible.[16] And under the Carmack Amendment to the Hepburn Act, requiring any common carrier receiving property for interstate transportation to issue a receipt or bill of lading therefor, and making it liable to the holder for any loss or injury to such property caused by it or by any carrier to which such property may be delivered, or over whose line it may pass, the liability of the carrier upon an interstate shipment is not limited to a loss or injury in transit, but extends to a misdelivery.[17]

2. **Shortage.** As has been pointed out, when the claimant shows the amount of the goods that has been delivered to the carrier and the amount that has been received, he has made out a prima facia case if there is shortage. The question of shortages, however, is one that has always caused a great deal of controversy. For instance, lumber that is loaded with snow on it may dry out in transit and so may arrive at destination lighter. Grain and sand may leak in transit, and the carrier deliver a smaller amount, and refuse to pay a shortage claim on the ground that it is not liable because loaded in an oper

in bad condition, and that neither the shipper nor his agent accompanied the stock in charge of the same during their transportation. In such case the burden is upon the railroad company to show that the loss or injury to the live stock did not result from negligence on the part of the railroad company, or that the cause of the loss or injury was within one of the excusatory exceptions recognized by the law or provided for by the terms of the contract. Walton Land & Timber Co. v. Louisville & N. R. Co. (Fla. 1916), 72 So. R. 485.

Generally a carrier may not exempt himself wholly from liabilit for his negligence, but can limit hi liability only by stipulations in them selves just and reasonable. Georg W. Lardie & Son v. Manistee & N. R. Co. (Mich. 1916), 158 N. W. 3

15. Ft. Worth & D. C. Ry. v. Allen (Tex. 1916), 189 S. W. 76

16. Chicago & E. I. R. Co. v. lins Produce Co., 235 Fed. 857.

17. Kemper Mill Co. v. Mo. Ry. Co. (Mo. 1916), 186 S. W. 8.

car or in a leaky car that the shipper accepted. In its recent decision on the bill of lading, the Interstate Commerce Commision discussed the question of shortages at great length, saying (52 I. C. C. p. 691): "Section 1, Clause 2, Differences in Elevator Weights—The present uniform and revised standard forms of bills of lading contain a provision that carriers shall not be liable for 'differences in the weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights.' The carriers desire to retain this provision in the proposed form. The shippers concede that the carrier is not liable for loss caused by natural shrinkage or the inherent nature of the property transported, but they propose the elimination of the words 'differences in the weight of grain, seed, or other commodities caused by * * * or discrepancies in elevator weights.' That a slight shrinkage in the weight of grain, relatively negligible, usually occurs under ordinary transportation conditions is a fact recognized in the trade, and allowances are made therefor in commercial transactions. No point of real difference is raised with respect to this feature and it need not be further discussed. The circumstances out of which the controversy relative to this provision grows are best illustrated in the handling of grain shipments. When grain is received by a carrier at a country elevator for transportation to a primary grain market or other destination, or is received by a carrier at a primary market for transportation to some other market or destination, the weight given by the shipper and accepted by the carrier is ordinarily that shown by the elevator out of which the grain is loaded. This weight is inserted in the bill of lading with a condition, invariably, that it is subject to correction. Frequently, upon arrival at destination, the grain is again weighed through another elevator and a difference between the first and second elevator weights appears. Now, in such a case a difference in the weights greater than that which could result from natural shrinkage usually results from one of two causes, viz., loss in transit, or 'discrepancies,' i. e., variance in the weights of the different elevator scales. 'Discrepancy' in the sense here used is understood to mean a difference in weights due either to error in calculating and recording the results of one or both of the weighing operations, or a difference

due to mechanical imperfection in one or both of the scales, as a result of which there is failure to record a correct weight. It is urged by those shippers who oppose the retention of this provision in the proposed bill that it gives the carriers opportunity to decline a claim upon the ground that the alleged loss is in reality not a loss but a 'discrepancy' due to a difference in elevator weights. To illustrate: A shipper loads 60,000 pounds of wheat in a car, according to weights at original point of shipment, but the carrier delivers only 59,000 pounds according to scale weights at destination. The carrier may, and does, excuse itself by quoting this clause in the bill of lading. The practical operation of the clause is to place the hazard of transportation on the shipper, whereas the liability should properly rest with the carrier. It is contended that it is no more difficult for the carrier to determine the correct elevator weights than it is to determine the correct scale weight of loaded cars; that whether a carrier has permitted grain to be lost or stolen is a question to be determined on the facts of the particular case and that the carrier should pay for such grain as may have been lost or stolen; that the clause is in contravention of the Cummins amendment. The testimony of shippers' representatives is that the claim departments of many carriers stand upon this provision of the bill of lading and refuse to pay claims for actual loss of grain while the same was in the carriers' possession, and that in such instances the shipper has no recourse but must pocket his loss. The actual loss of grain in transit might, and doubtless would, be indicated by a difference between origin and destination weights, but the shippers seem to entertain the idea that every difference disclosed between origin and destination weights is, ipso facto, proof of loss of the commodity in transit. They ignore the other possible explanations of such "discrepancies." By section 21 of the bills of lading act, reference being had to the subject of shipper's weight, load, and count, when property is loaded by the shipper, it is provided: "Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable

time after such written request, and the carriers shall not in such cases insert in the bill of lading the words 'shipper's weight,' or other words of like import, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein." In Illinois the state legislature, pursuant to a mandatory constitutional provision requiring it to pass all necessary laws to give effect to one of the articles of that instrument, enacted a law requiring railroad companies to weigh carefully and correctly grain at the time it was received for shipment, to give receipt for the true and correct amount, and to weigh out and deliver the full amount of such grain, without deduction for leakage, shrinkage, or other loss. A uniform bill of lading act, held not to be repugnant to or inconsistent with the statute first referred to, provided that a carrier might insert in a bill of lading any terms or conditions, not contrary to law, or public policy, which did not impair its obligation to use reasonable care, and that such terms and conditions should be binding upon the consignor receiving such bill and making no objection in writing to such terms and conditions so far as they were not contrary to law or public policy. In an action for the loss of grain in transit brought under this statute the plaintiff recovered a judgment in a circuit court of the state which, on appeal to the supreme court of the state, was reversed because of error not relevant to the question we are here considering. The bill of lading, however, contained a provision similar to that to which objection is here made, and the court in reference to the same said: 'We regard that clause in the conditions which exempts a carrier from liability for difference in the weights of grain, seed, or other commodities caused by discrepancies in elevator weights as contrary to public policy,' and further: 'We assume that "discrepancy in elevator weights" means difference between weights at the place of delivery and the place of shipment. While the railroad company is responsible for the delivery of the numbers of pounds of grain received, and its receipt in the bill of lading evidence of the quantity received, the constitutional provision was not intended to make the bill of lading an absolute policy of insurance or extend the responsibility of the carrier beyond its responsibility at common law in other respects.' Shellabarger

Elevator Co. v. Illinois Cent. R. Co., 278 Ill., 333. Unde
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vide a like opportunity at destination where, for instan
is delivered into an elevator and weighed by the elevato
signee. The carrier is liable, both at common law and u
federal statute, for any actual loss of goods caused by it
transit. If a difference in weights results from actual lo
goods so caused by it, the carrier must pay the claim
loss. Under the law it is the carrier's duty to collect,
shipper's duty to pay, freight charges based upon cor
estimated, weights. The claimed loss presents a questio
Whether or not a 'discrepancy' in elevator weights resu
actual loss of the commodity or an error, human or me
in the weighing operations, is a question of fact to be de
from all the evidence. The burden of proof to show wh
correct weight should depend, in a measure at least, upc
of the parties, carrier or shipper, is responsible for the acc
the weights. It would appear, therefore, that the dispu
vision relative to 'discrepancies in elevator weights' is o
effect in limiting the liability of the carrier and is m
plusage. Upon brief, one of the shippers' representati
that it 'adds nothing to and subtracts nothing from the
of a common carrier. Its presence, however, in the uni
of lading, which is filed with and becomes a part of the
tariff authority under section 6 of the act to regulate co
is mischievous in actual practice and is used as a pre
claim agents for turning down claims. It thus becomes
of discord between carriers and shippers and tends t
strong prejudices in the minds of shippers against railr
is a constant source of commercial irritation.' We a
opinion that the words 'differences in the weights of gr
or other commodities caused by * * * or discrepanic
vator weigths' impart an unlawful and unreasonable
into bills of lading and should be stricken from the unif

3. **Liability of Receivers.** Generally speaking, receivers of a road are not liable for loss and damage claims which accrued prior to the time the road went into receivership, but where potatoes shipped by rail were still in possession of the road when it went into the hands of receivers, such receivers, by taking over the road, adopted the contract of shipment and become liable for any damage caused thereto.[18] Where the receiver of a railroad contracted to transport a shipment within a state, freight charges payable at destination, and before delivery, the destination was changed and a bill of lading issued for transportation beyond the state, the receiver was liable as an initial carrier of interstate commerce; it being within his authority to so modify the original contract.[19]

4. **Initial Carrier.** The Carmack Amendment made the initial carrier liable for a loss that occurred anywhere during transportation.[20] This statutory liability was not changed by any

18. Loveland & Hinyan Co. v. Waters (Mich. 1916), 159 N. W. 477.

19. Andrews v. Roberts (Tex. 1917), 192 S. W. 569.

20. The purpose of the Carmack Amendment was to harmonize the different state decisions and make one uniform rule of law.

Under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor, specifying the freight for through carriage, it makes the connecting carriers its agents. and is responsible to the shipper for any loss or damage to such property, either on its own or the connecting lines, which liability it cannot limit by contract. St. Louis & S. F. R. Co. v. Akard (Okla. 1916), 159 Pac. 344.

The initial carrier is liable for a misdelivery by the terminal line. King v. Barbarin, 249 Fed. 303.

An initial carrier, issuing its bill of lading for an interstate shipment of goods, becomes liable to the lawful holder of the bill of lading for damage to the shipment, caused by it or any connecting carrier over whose lines the shipment passes before reaching destination. St. L., I. M. & S. Ry. Co. v. Cunningham Commission Co. (Ark. 1916), 188 S. W. 1177; Reid v. Fargo, 36 Sup. Ct. 712.

Althought a contract of affreightment, which was signed by both parties, contained a provision that the railroad company issuing it agreed to carry the property shipped to the company's usual place of delivery at the destination named, if on its line, and otherwise to deliver to the next carrier on the route of its destination, and although the property had to pass over the lines of three railroad companies in order to reach its destination, yet in suit brought for damages, not on the contract, but based on an alleged breach of duty by the first railroad company as a

part of the Cummins Amendment. And the first carrier to whom the shipment is delivered is the "initial carrier," within the meaning of the amendment, and is liable for all injuries

common carrier, and for an alleged overcharge in freight, under Civ. Code 1910, Secs. 2777, 2778, it was not incumbent upon the plaintiff, in order to make out its case, to show on which of the railroads the alleged negligence occurred. Atlanta & West Point R. Co. v. Fairburn Marbel Co. (Ga. 1916), 89 S. E. R. 817.

In some states, however, the carriers by limiting liability in the bill of lading to their own line, were not deemed to have made connecting lines their agents and, therefore, not responsible for any damage caused by such connecting lines. The Carmack Amendment, therefore, imposes an absolute liability on the initial carrier by making it absolutely liable for any default and it should be noted that the common-law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack Amendment, making the initial carrier of an interstate shipment liable for any loss, damage, or injury "caused by it" or by any other carrier to which the shipment may be delivered. Cincinnati, New Orleans & Texas Pac. Ry. Co. v. Rankin, 36 Sup. Ct. 555.

The common-law rule of liability of a carrier for goods shipped was not changed by the Carmack Amendment (Act June 29, 1906, Chap. 3591, Sec. 7, pars. 11, 12, 34 Stat. 593 (U. S. Comp. St. 1913, Sec. 8592), the purpose of which was to make the first carrier liable as at common law. Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co. (Mo. 1916), 187 S. W. 149.

A car of grain billed from a point in one state to a point in another state bearing an order on the face of the bill of lading to notify the consignor care the Santa Fe Railway for shipment, "make it apparent that it is not contemplated that the shipment should terminate at such destination," but that the car should move on as a result of such direction as might be given while it was in transit, and, therefore, where such car is reconsigned in transit, to a new destination, and an exchange bill of lading issued covering such shipment, it is, as to its movement from its original point of shipment to its ultimate destination, a continuous interstate shipment. Atchison, T. & S. F. R. Co. v. Harold, 36 Sup. Ct. 665, 667; 241 U. S. 371; 60 L. ed. 1050.

A carload of grain originally shipped from Yanka, Nebr., consigned to Topeka, Kan., to the order of the consignors, with a direction to notify, "care of Santa Fe for shipment," a grain company residing and doing business at Kansas City, Mo., to which the bill of lading was indorsed with draft for the purchase price attached, must be deemed to have moved in a continuous interstate commerce shipment from the date of its departure from Yanka to the termination of the transit over the Santa Fe Railroad from Topeka, Kan., to Elk Falls, Kan., under an exchange bill of lading which the grain company had obtained from the agent of the Santa Fe at Kansas

oned through the negligence of its connections, even h the shipment is reconsigned in transit, and the original

consigning the identical car ll in transit to their own order Falls, and, therefore, the deliv- the car to the Santa Fe at for further movement was new and distinct shipment in ite commerce. Atchison, T. & L. Co. v. Harold, *supra*.

common carrier which re- goods for interstate shipment "initial carrier," although it vitches the car in which they ided to the lines of another n carrier, to be transported out state. Barrett v. Northern Pac. (Idaho 1916), 157 Pac. 1016.

an express company which ac- in London an automobile to ped to New York, and, having the same, shipped it by an carrier without declaring its aking from the steamship com- bill of lading limiting liability unless a greater value is de- and extra freight paid, was arily liable to the owner, where ar was seriously damaged h the negligence of stevedores ed by the steamship company harge the cargo, even though press company be regarded as forwarding agent. Reid v. 36 Sup. Ct. 712.

Carmack Amendment makes al carrier responsible for a de- curring on its own line or on of a connecting carrier, with- ysical damage to the goods. pp v. Atlantic Coast Line R. C. 1916), 89 S. E. R. 1035.

er the Carmack Amendment, a n carrier which receives goods nsportation from a point in one state to a point in another, it if routes the latter its agent, and is liable to the owner of the goods, or his assigns, for any damage which results from negligence or carelessness in transportation, whether the damage occurs upon its own line or upon that of the carrier to which it delivers the consignment. Barrett v. Northern Pac. Ry. Co. (Idaho 1916), 157 Pac. 1016.

An initial carrier is not liable for damage to goods occurring on lines not its own, and over which they were routed without notice to it. The obligation of such a carrier ceases when the goods reach the destination, in good condition, to which they were originally consigned. Barrett v. Northern Pac. Ry. Co. (Idaho 1916), 157 Pac. 1016.

An initial carrier of an interstate shipment, by noting in the bill of lading, "Car to be opened by consignee," had no authority to vary the regulation of the Interstate Commerce Commission that the terminal carrier should unload all cars consigned to a particular station. Greenwald v. N. Y. C. & H. R. R. Co., 159 N. Y. S. 15.

An initial carrier in the United States is not liable under the Carmack Amendment for loss occasioned by a Mexican connecting carrier. Aldrich v. Atlantic Coast Line R. Co. (S. C. 1916), 89 S. E. R. 315.

And an interpretation of contracts for shipment over connecting lines, as being for through shipment, making the initial carrier liable for damages wherever occurring, is favored. Keithley & Quinn v. Lusk (Mo. 1916), 189 S. W. 621.

If flour after removal to the warehouse was negligently stored or unlawfully sold at the instance of the delivering carrier, the shipper, as owner, could look alone to the delivering carrier, and the warehousemen, as the responsible parties, and not to the initial carrier, which had no part in the keeping or disposal of the flour after its delivery to the warehousemen. Model Mill Co. v. Carolina C. & O. Ry. Co. (Tenn. 1916), 188 S. W. 936.

Under the federal law, the initial carrier is responsible for any loss caused to the goods in any manner (other than the excepted causes) by any connecting carrier.

So the initial carrier is liable for the failure of the terminal carrier to properly notify the consignor of failure to deliver goods shipped. Stoddard Lumber Co. v. Ore. Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where bills of lading are not changed by the issuing carrier on a shipment reconsigned in transit, the action of the carrier in accepting such reconsignment instructions has the effect of continuing in force, the bills of lading so that the issuing carrier is liable for any loss to the shipment occasioned by a connecting carrier although at a more distant point than covered by the bills of lading originally issued. Gulf, Colo. & Santa Fe Ry. Co. v. Texas Packing Co., 37 Sup. Ct. 487, 489, 244 U. S. 31.

In a very recent case, cattle were shipped from Alabama to New Orleans, but the bills of lading contained no stipulations as to point or mode of delivery after arrival at New Orleans. Defendant initial carrier delivered the cattle at the L. & N. Railroad at Montgomery, Ala., by which road they were carried to the terminus at New Orleans. The consignee received two cars of cattle at the L. & N. pens while all the others were delivered over the L. S., a local road, to an adjacent parish, where consignee had its yards and place of business. By custom or course of dealings between consignee and the L. & N. Road consignee had the option of receiving shipments at the L. & N. stockyards or through an intermediate carrier. *Held* that defendant carrier's liability ended when the shipment arrived at the terminal of the L. & N. Road for delivery, and where plaintiff shipper's failure to prove that the condition of the cattle was produced by defendant or the L. & N. Railroad, the court properly directed a verdict for defendant. Fred Henderson & Walters v. A. C. L. R. Co. (Ala. 1917), 76 So. 309. In this case the court said: "The bills of lading issued by the defendant, as here, 'upon an interstate shipment governs the entire transportation, and thus fixes the obligation of all participating carriers to the extent that the terms of the bill of lading are applicable and valid.' In other words, the act of Congress cited above 'casts upon the defendant, the initial carrier, the responsibility with respect to the entire transportation.' Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co., 241 U. S. 190, 194, 195, 196, 36 Sup. Ct. 541, 544, 60 L. Ed. 951, 952. While the question as to the responsibility of the initial carrier under the bill of lading is a federal one, 'it must be resolved by the application of general principles of the common law.' So. Ry. Co. v. Prescott, 240 U. S. 640, 36 Sup. Ct. 473, 60 L. Ed. 840. As said in Adams Express Co. v. Croninger, 226 U. S. 491, 511, 33 Sup. St. 148, 154, 57 L.

4, 322, 44 L. R. A. (N. S.) The statutory liability, aside esponsibility for the default of ecting carrier in the route, is yond the liability imposed by nmon law as that body of law ble to carriers has been inter- by this court as well as many of the states.' See, also, Kan- y So. Ry. Co. v. Carl, 227 U. 33 Sup. Ct. 391, 57 L. Ed. 683,

manifest object sought to be olished by the act of Congress prevent the initial carrier from cting against the obligation of e beyond its own line, and making each succeeding car- the route the agent of the for a continuance of the ortation.

obligation imposed by the act ot differ materially from that d by a carrier of an interstate nt, where a through bill of was issued for the transporta- f the goods. A. C. L. R. R. Riverside Mills, 219 U. S. 186, 5, 196, 31 Sup. Ct. 164. 55 L. 7, 177, 178, 31 L. R. A. (N. S.) e Ann. Cas. 1915, 83, 84, and cited.

never was the purpose of the Congress to make the initial liable for loss or damage sus- or insurred upon any line han- he shipment other than the con- carrier or carriers handling ipment en route between the of origin of shipment and the f destination. When the ship- as here, arrived in New Orleans terminal of the Louisville & ille, and was there ready for y, this was a fulfillment of the tions undertaken and assumed defendant under its bills of lading, and it cannot be held responsible for any loss or damage that may have occurred to the cattle after they were delivered by the Louisville & Nashville to the Louisiana Southern for transportotion to the consignee's place of business. The liability of the defendant cannot be extended beyond the contract evidenced by the bill of lading; that is, to deliver the shipments of cattle at New Orleans." Fred Henderson & Walters v. A. C. L. R. R. Co. (Ala. 1917), 76 So. 309, 311.

But where the shipper of an interstate shipment of live stock sued the initial carrier for damages and satisfied a judgment on a verdict for less than the amount claimed, he thereby discharged the other carriers, and hence could not sue the tearminal carrier for its negligence causing part of the damage. O'Briant v. Pryor (Mo. 1917), 195 S. W. 759.

In Haglin-Stahr Co. v. Montpelier & W. R. R. Co. (Vt. 1918), 102 Atl. 940, the court said, pp. 943, 944:

"But it is insisted that the Carmack Amendment has restricted this liability, at least so far as the initial carrier's responsibility for damages suffered after the goods were delivered to the connecting carrier is concerned, and that thereunder the initial carrier is liable for damages so occasioned only in case of negligence on the part of the connecting carrier. In other words, the claim is that, though the initial carrier may stand as an insurer so far as loss or injury on his own line is concerned, after he has delivered the property in good order to the connecting carrier he is only liable for such loss or injury as may result from that carrier's negligence. The provision of the statute is that a carrier who accepts a shipment

for a point in another state shall be liable for any loss, damage, or injury 'caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass.' U. S. Comp. St. 1916, § 8604a. To support its position as to the true meaning of this provision, the defendant relies upon Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. It is true that this case has been sometimes accepted as authority for the position taken by the defendant. But this interpretation of it is unwarranted. The language used by Mr. Justice Lurton in discussing the statute in question is as follows:

"'What is the liability imposed upon the carrier? It is a liability * * * "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any any every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to any "loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common-law duty as a common carrier.'

"It thus appears that the court was talking about a liability as an absolute insurer, one liable without any exception, and did not intend to lay down a rule in any respect short of the common-law rule. That a carrier could be guilty of some default in its common-law duty, and at the same time not be guilty of negligence, is quite apparent. For if it failed to carry safely it would be so in default, no matter how careful it had been. In speaking of the Carmack Amendment as thus construed, it was said by Mr. Justice McReynolds in Cincinnati, etc., R. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265:

"'Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line.'

"This language, taken with that of Mr. Justice Lurton, quoted above, has given rise to the idea that there are two rules by which to measure the liability of an initial carrier—one to use when the loss occurs on its own line, and the other when the loss occurs on the line of a connecting carrier. The idea is erroneous. It is clear from the language of Mr. Justice McReynolds that so far as loss or damage occurs on the lines of the initial carrier, his common-law liability therefor is unaffected by the amendment. This was as far as the case then in hand required the court to go. But in other cases it is made plain that the amendment extends this common-law liability throughout the transit. In Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, Mr. Justice Lurton says:

"'Reduced to the final results, the

ess has said that a receiving r * * * shall be deemed, it receives property in one state ransported to a point in another ing the use of a connecting car- or some part of the way, to have ed such other carrier as its and to incur carrier liability ghout the entire route. * * *' is plain enough that the car- ability' here spoken of is the on-law liability as hereinbefore . Again, in Galveston, etc., Ry. Wallace, 223 U. S. 481, 32 Sup. 5, 56 L. Ed. 516, Mr. Justice , in speaking of the initial car- liability, says:

(the initial carrier) thereby l to treat the connecting car- as its agents, for all purposes nsportation and delivery. This hen, must be treated as though oint of destination was on its ine, and is to be governed by me rules of pleading, practice resumption as would have ap- if the shipment had been be- stations in different states, but on the company's railroad.'

rely, this statement can be jus- only on the ground that the carrier's common-law obliga- continue throughout the chain nsportation. Other cases to the effect are: Missouri, K. & T. . v. Harriman, 227 U. S. 657, 33 Ct. 397, 57 L. Ed. 690; Collins nver & R. G. Ry. Co., 181 Mo. 213, 167 S. W. 1178; Storm etc., Factory v. St. L. R. Co. .), 209 Fed. 895; Georgia, etc., . v. Blish Milling Co., 241 U. S. 6 Sup. Ct. 541, 60 L. Ed. 948. defendant, then, is liable for the ge here shown, unless it resulted some of the excepted causes specified."

It has been held, however, that an initial carrier is not liable for any default of the delivering carrier which that carrier has done after the goods have been held at destination and its liability is changed to that of a warehouseman. Adams Seed Co. v. Chicago Great Western R. Co. (Iowa 1917), 165 N. W. 367.

If goods arrived over the initial and connecting line in proper condition and were so delivered to the final carrier, which transported them in safety to the destination and held them there for a reasonable time for delivery to the consignee, its liability thereafter ceased as a carrier, and it was liable only as a warehouseman, and no negligence thereafter could be charged to the initial or connecting carrier. Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367.

Under the Carmack Amendment the initial carrier is not liable for the negligence of the delivering carrier after its relationship as carrer has ceased, and its duty to the consignee and to the goods becomes that of warehouseman only. Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367.

If the final carrier by its negligence causes loss of goods at the destination before reasonable time for delivery to the consignee has elapsed, the initial carrier is liable under the Carmack Amendment for such loss, though an intermediate connecting carrier is not. Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367.

In Adams Seed Co. v. Chicago Great Western R. Co. (Ia. 1917), 165 N. W. 367, the court said, pp. 370, 371:

"Under the Carmack Act the initial

carrier is not liable for the negligence of the delivering carrier after its relationship as carrier has ceased, and its duty to the plaintiff and to the goods becomes that of warehouseman only. Or, in other words, if the transit was at an end, if the delivering carrier had ceased to have possession of the goods as carrier, and held them in another capacity, as warehouseman, then the delivering carrier was responsible only for the care and diligence which the law attached to that relation, and the loss occurring while held in that relation does not reach back and involve the initial carrier or any connecting carrier.

"As supporting what we have said, see Norway Plains Co. v. B. & M. Co., 1 Gray (Mass.) 263, reported in 61 Am., Sec. 423; Gregg v. Illinois Central Ry. Co., 147 Ill. 550, reported in 35 N. E. 343, 37 Am., St. Rep. 238; Kight v. Wrightsville T. & R. Co., 127 Ga. 204, 56 S. E. 363, in which it is held:

"'When goods which have been received by a railroad company for transportation to a given station on its line of road and delivery there to a consignee of the same reach their destination and are there deposited by the company in its freight warehouse for safe-keeping until delivered to such consignee, the general rule is that the responsibility of the company as common carrier ceases, and its liability as a warehouseman begins.'

"See, also, Hogan Milling Co. v. Union Pacific Ry. Co., 91 Kan. 783, reported in 139 Pac. 397. In this case it is held that it was not the purpose of the Carmack Amendment to make the initial carrier liable where the connecting carrier's liability as a carrier has ceased, and it was said:

"'It was not the purpose of the amendment to extend the carrier's common-law liability, except to provide that until the transportation (is) ended the liability of an initial carrier should continue exactly the same as if it owned one line of railway from the point of shipment to the point of (its) destination.'

"It was further said:

"'The initial carrier under the Carmack Amendment is only made liable for loss, injury, or damage resulting from some default in its common-law duty as a common carrier, or some default of the same kind in a succeeding carrier. It does not make the initial carrier liable as a carrier for a loss or injury to goods occurring while held by the succeeding carrier as warehouseman.'

"In Norfolk & W. Ry. Co. v. Stuart's Draft Milling Co., 109 Va. 184, 63 S. E. 415, the Supreme Court of Virginia said:

"'If goods are not received by the consignee within a reasonable time after their arrival, the railroad company's liability as a common carrier ceases, and its liability thereafter is only as a warehouseman.' It was further held that, where a connecting carrier's liability as carrier for an interstate shipment had terminated, the initial carrier would not be liable for the value of the goods under the Carmack Amendment for the reason that the liability of the initial carrier attaches only while the goods remain in its possession, or in the possession of its connecting carriers as such. See, also, Model Mill Co. v. Carolina, C. & O. Ry. Co., 136 Tenn. 211, 188 S. W. 936."

Since, however, it has been held by the Supreme Court of the United States that the limitation in the bill of lading defining the measure of

damages applies to the liability of the terminal carrier as warehouseman, and that when sued in that capacity claimant cannot recover more than the amount specified in the bill of lading, it would seem that the logical development of this rule would be to hold the initial carrier liable until the shipment is actually disposed of. Warehousing is part of the "transportation" which is defined by the Interstate Commerce Act. The better rule would seem to be, therefore, to say that the initial carrier's liability continues until the entire transportation, as defined by the Interstate Commerce Act, is completed. Under such a rule, the initial carrier is liable for any default of the connecting carrier as a warehouseman.

As has been discussed at some length in the first chapter, the liability of a carrier for negligence must now be ascertained solely with reference to the law in the federal courts, or as expressed in the Cummins, or its predecessor, the Carmack Amendment.

In St. L. I. M. & S. R. Co. v. Starbird, 37 Sup. Ct. 462; (243 U. S. 592), the court said, pp. 464, 465:

"As the shipment in this case was interstate, there can be no question that, since the decision in the Croninger Case, supra, the parties are held to the responsibilities imposed by the Federal law, to the exclusion of all other rules of obligation. Since the Carmack Amendment, the carrier in this case is liable only under the terms of that act of Congress, and the action against it to recover on a through bill of lading for the negligence of connecting carriers as well as of itself was founded on that Amendment. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 196, 55 L. ed. 167, 178, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164.

"This principle has been so frequently recognized in the recent decisions of this court that it is only necessary to refer to some of them. In Southern R. Co. v. Prescott, 240 U. S. 632, 636, 639, 60 L. ed. 836, 838, 839, 36 Sup. Ct. Rep. 469, this court said:

"'As the shipment was interstate, and the bill of lading was issued pursuant to the Federal act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. * * * Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intention of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions.' In Southern Exp. Co. v. Byers, 240 U. S. 612, 614, 60 L. ed. 825, 827, L. R. A. 1917A, 197, 36 Sup. Ct. Rep. 410, this court said: 'Manifestly, the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading, and common-law principles accepted and enforced by the Federal courts.' To the same effect, Northern P. R. Co. v. Wall, 241 U. S. 87, 91, 92, 60 L. ed. 905, 907, 908, 36 Sup. Ct. Rep. 493; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241

U. S. 319, 60 L. ed. 1022, L. R. A. 1917A, 265, 36 Sup. Ct. Rep. 555.

"As to the part of § 237 which deals with rights of this character, it requires that the right, privilege, etc., must be especially set up or claimed in order to make a decision of the state court a proper subject of examination by writ of error from this court.

"It would be superfluous to review the many decisions in which this court has had occasion to consider the effect of this provision, which has been in the law ever since the passage of the Judiciary Act of 1789 in practically the terms in which it is now embodied in § 237.

"It is manifest that the object of the provision is to require that the alleged right of a Federal character must in some way be drawn to the attention of the state court so that it may know, or, from the nature of the pleadings, be held to have known, that a Federal right was before it for adjudication.

"The Carmack Amendment is a Federal statute regulating interstate commerce. It was passed under the power conferred by the Constitution upon Congress to regulate such commerce, and is applicable throughout the United States, and at once became the rule of law governing such shipments in all the courts of the country. Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, 838; Second Employers' Liability Cases 44, 32 Sup. Ct. Rep. 169, I N. C. C. A. 169.

"Since the passage of the Carmack Amendment, the state court must be held to have known that interstate shipments were covered by a uniform Federal rule which required the issuance of a bill of lading, and that that bill of lading contained the entire contract upon which the responsibilities of the parties rested. This is the result not only of our own holdings, but is universally held in the state courts. St. L. I. M. & S. R. Co. v. Faulkner, 111 Ark. 430, 164 S. W. 763; Gamble-Robinson Com. Co. v. Union P. R. Co. 262 Ill. 400, 104 N. E. 666, Ann. Cas. 1915B, 89; Johnson Grain Co. v. Chicago, B. & Q. R. Co. 177 Mo. App. 194, 164 S. W. 182; Clingan v. Cleveland, C. C. & St. L. R. Co. 184 Ill. App. 202; Kansas City & M. R. Co. v. Oakley, 115 Ark. 20, 170 S. W. 565; Mitchell v. Atlantic Coast Line R. Co. 15 Ga. App. 797, 84 S. E. 227; Bailey v. Missouri P. R. Co. 184 Mo. App. 457, 171 S. W. 44; Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379; St. Louis & S. F. R. Co. v. Bilby, 35 Okla. 589, 130 Pac. 1089; Missouri, K. & T. R. Co. v. Hailey, — Tex. Civ. App. —, 156 S. W. 1119; American Silver Mfg. Co. v. Wabash R. Co., 174 Mo. App. 184, 156 S. W. 830; Wabash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724; Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019; Ford v. Chicago, R. I. & P. R. Co., 123 Minn. 87, 143 N. W. 249; Joseph v. Chicago, B. & Q. R. Co. 175 Mo. App. 18, 157 S. W. 837; Barstow v. New York, N. H. & H. R. Co., 158 App. Div. 665, 143 N. Y. Supp. 983; Missouri, K. & T. R. Co. v. Walston, 37 Okla. 517, 133 Pac. 42; St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; Texas & P. R. Co. v. Langbehn, — Tex. Civ. App. —, 158 S. W. 244; Cincinnati, N. O. & T. P. R. R. Co. v. Rankin, 153 Ky. 730, 45 L. R. A. (N. S.) 529, 156 S. W. 400."

The Carmack Amendment refers

only to bills of lading and does not apply to an action by the shipper under an Illinois statute requiring the carriers to weigh shipments of grain in bulk and state the weight on the receipt or bill of lading. Shellabarger Elevator Co. v. Ill. Cent. R. Co. (Ill. 1-917), 116 N. E. 170.

Const. art. 13, § 4, requiring railroad companies to weigh or measure grain shipped and receipt for the full amount, and to deliver the full amount at destination, does not make the carrier an absolute insurer of the grain, but only requires delivery of the full weight at destination, unless prevented by the act of God or the public enemy, or by the negligence of the shipper. Shellabarger Elevator Co. v. Ill. Cent. R. Co. (Ill. 1917) 116 N. E. 170.

A provision of a bill of lading exempting the carrier from liability for differences in the weights of grain caused by natural shrinkage or discrepancies in elevator weights is contrary to public policy, so as not to be permitted by the Uniform Bills of Lading Act, in view of Const. art. 13 §§ 4, 6, and Act April 25, 1871, § 1, which were adopted to prevent loss to grain shippers occasioned by delivery by carriers of smaller quantities of grain than were shipped. Shellabarger Elevator Co. v. Ill. Cent. R. Co. (Ill. 1917) 116 N. E. 170.

Under the Carmack Amendment, 34 Stat. 595 (U. S. Comp. St. 1916, § 8604A), an initial carrier is liable for all damages for the through shipment, although all or a part of the damage accrued by reason of the negligence of the terminal carrier. O'Briant v. Pryor (Mo. 1917) 195 S. W. 759.

Where turkeys were shipped over the S. road, and, at destination, the O. road switched the shipment from the S. tracks to the place of business of the shipper, the O. road acting as agent for the S. road, it was immaterial when the delay and rough handling which damaged the shipment occurred; the S. road being liable in either case, though the bill of lading limited its liability to damage occurring on its own line. Shipment entirely within Texas. Panhandle & S. F. Ry. Co. v. Wrightherndon Co. (Tex. 1917) 195 S. W. 216.

Under bills of lading stipulating for through transportation from points in Alabama to New Orleans, the initial carrier had the responsibility of the entire transportation between the points or origin and destination, in view of the Carmack Amendment. Fred Henderson & Walters, v. A. C. L. Ry. Co. (Ala. 1917) 76 So. 309.

Under Interstate Commerce Act making the initial carrier liable for negligence on the part of any of the carriers, evidence of the negligence of a connecting carrier is admissible as against the initial carrier. C. R. I. & G. Ry. Co. v. Jenkins (Tex. 1917) 196 S. W. 679.

Under a state law it has been held, that when a person seeks, under the North Dakota Code, to recover against the initial carrier for goods lost or injured while in the possession of a second connecting carrier, he must prove a demand on such initial carrier for satisfactory proof that the loss or injury did not occur while it was in its charge, and a failure of such carrier to furnish such proof. Assid v. G. N. Ry. Co. (N. D. 1917) 164 N. W. 949.

The Carmack Amendment applies to damage to the shipment resulting from delay in transportation as well

as to damage resulting from injury to the property, and therefore a clause in a bill of lading relieving the initial carrier from liability for delay not occurring on its own line is void. Gulf, C. & S. F. Ry. Co. v. Nelson, (Tex. 1917) 192 S. W. 1056.

The Carmack Amendment is in effect only for the purpose of enabling the shipper to obtain redress from the initial carrier for any breach of the original contract of shipment, regarded as the through contract. It matters not that the route is selected by the shipper, and is one over which the carrier has no through rate. N. & W. Ry. v. Dixie Tobacco Co., 228 U. S., 593, 57 L. Ed. 980, 33 Sup. Ct., 609.

And does not cover damages arising from the breach of a new contract entered into at destination and after arrival of the goods, between the shipper and the delivering carrier. Wien v. N. Y. C. & H. R. R. Co., 152 N. Y., 154, 158.

The theory is that the connecting carriers are to be treated as the agents of the initial carrier for the purpose of transportation and delivery, and the case as though the point of destination were on its own line, operated in different states. The goods not having been delivered, the presumption attaches that they were lost through the negligence of the initial carrier or its agents, and the burden of proof that the loss resulted from some cause for which the initial carrier was not responsible is thrown upon the carrier. A. C. Cheney P. A. Co. v. N. Y. C. & H. R. R. Co., 152 N. Y. S. 285, 293.

So damages sustained by a shipper by reason of the failure of a delivering carrier to return a shipment as requested after the original transportation had ended is not such damage or injury as is covered by the Carmack Amendment so as to make the initial carrier responsible for the ensuing loss. Wien v. N. Y. C. & H. R. R. Co., 152 N. Y. S. 154.

And where damages resulted from the failure of the final carrier to return property refused by the consignee as requested by the shipper who accepted the suggestion from the carrier's agent, and took upon himself the negotiations of the agent with the final carrier for the return of the consignment, the initial carrier is not responsible under the Carmack Amendment. Wien v. N. C. & H. R. R. Co., 152 N. Y. S. 159.

A carrier of live stock cannot under the Hepburn Act, exempt itself by contract from liability for negligence, or that of its servants causing damage to an interstate shipment of live stock. Chicago, R. I. & P. Ry. Co. v. Core (Tex. 1915), 178 S. W. 778.

It may, therefore, be stated that the liability of the initial carrier under the Carmack Amendment ends when the liability of the final carrier as a warehouseman commences. Wien v. N. Y. C. & H. R. R. Co., 152 N. Y. S., 154, 158.

But a limitation of liability applies to goods lost by a carrier acting as warehouseman, to the same extent as if lost while in its possession as carrier. C. C. C. & St. L. Ry. v. Dettlebach, 239 U. S. 588, 60 L. Ed. —, 36 Sup. Ct. 177.

It should be remembered, the provision of the Carmack Amendment that the holder of any bill of lading issued for interstate carriage should not be deprived of any right of action or remedy he had under the ex-

ı altered.[21] If a shipment is reconsigned in transit, and ınge" bill of lading is issued, the carrier issuing it as to its further transportation, an "initial carrier"

refers only to existing
/s. Stubblefield v. St.
F. R. Co. (Mo. 1916) 184
So. Ry. Co. v. Bennett
36 S. E. 418.

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: or impair the separate
terminal or delivering
losses occurring on their
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. Louisville & N. R. Co.
ıla. 1916) 71 So. 338.

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it has been held that, in
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ıny common carrier, rail-
sportation company," not
insurers, but to be fixed and determined according to the principles of general law applicable to common carriers, and as modified by statutes relevant to the subject. Bunson & Kramer v. Norfolk Southern R. Co. (N. C. 1905), 86 S. E. 371, 372.

Where under the law existing before the Carmack Amendment a shipper of live stock might recover under a verbal contract, he may thereafter recover under a verbal contract where no valid written contract was made; the amendment declaring that nothing should deprive the holder of any receipt or bill of lading of any remedy or right of action which he had under existing laws. Panhandle & S. F. Ry. Co. v. Jones (Tex. 1916), 182 S. W. I.

21. B. & O. R. R. Co. v. Montgomery, (Ga. 1916) 90 S. E. 740.

Plaintiff shipped a carload of freight from Mankato to Duluth over the Omaha Railway which delivered it to plaintiff at the latter place. Plaintiff then delivered it to defendant for transportation from Duluth to Hartford, Conn., and defendant issued a through bill of lading therefor. It was damaged after defendant had delivered it to a connecting carrier. The Omaha Company did not undertake to cause the shipment to be carried beyond Duluth and did not know that it was to be carried beyond that point. *Held*, that defendant was the initial carrier within the purview of the Carmack Amendment. Victor Produce Co. v. Western Transit Co. (Minn. 1916), 160 N. W. 248.

within the meaning of the Carmack Amendment.[22] Prior to the effective date of the Cummins Amendment, June 2nd, 1915, the initial carrier receiving property at a point within the United

22. B. & O. R. R. Co. v. Montgomery, (Ga. 1916) 90 S. E. 740.

In M. B. & O. R. R. v. Montgomery (Ga. 1916) & Co. 90 S. E. 740, the court said, p. 740:

"While in a suit for damages to an interstate shipment handled by more than one carrier the provisions of what is known as the "Carmack amendment." (Act June 29, 1906, 34 Statutes at Large, 593, c. 3591) to the act of Congress known as the "Hepburn Act" (the act of February 4, 1887, 24 Stat. at Large, 379, c. 104 [U. S. Comp. St. 1913, § 8592, pars. 11, 12]) do not require that the suit shall in all cases be brought against the initial carrier (Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; Central of Georgia Ry. Co. v. Waxelbaum, 18 Ga. App. 489, 89 S. E. 635), yet, under the facts of the instant case, the defendant railroad company would not be liable to the plaintiffs, if it was not the initial carrier of the shipment; and the sole question for determination is: Was the defendant the initial carrier? There is no dispute as to the facts in the case. The Branch Mountain Orchard Company, the shipper, delivered to the Baltimore & Ohio Railroad Company, the initial carrier, at Moorefield, W. Va., on August 22, 1915, a carload of peaches in Baltimore & Ohio refrigerator car No. 14773; and the railroad company on the same day issued to the shipper a bill of lading, in which the destination was given as Richmond, Va., and the consignees Montgomery & Co. at Richmond, Va. This car was delivered by the Baltimore & Ohio Railroad Company to the Richmond, Fredericksburg & Potomac Railroad Company at Potomac Yard, Va., and arrived at Richmond, Va., August 24, 1915, where the contents of the car were inspected by the consignees, Montgomery & Co., and found to be in good condition. Upon the same date this car was delivered to the Atlantic Coast Line Railroad Company at Richmond, Va., and was reshipped to E. B. Stewart & Co., Atlanta, Georgia, upon the original bill of lading issued by the defendant. The bill of lading issued by the Baltimore & Ohio Railroad Company was the only bill of lading issued during the transit of the shipment. It was undisputed that Montgomery & Co. were the lawful holders of this bill of lading. The federal Interstate Commerce Act, as amended, expressly provides that the initial carrier shall issue a receipt or bill of lading, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose lines such property may pass. In interstate shipments the consignee is the presumptive owner, and has the right to direct a change in the destination of the shipment. Hutchinson on Carriers, § 735. When the defendant, the initial carrier, issued the bill of lading in which Montgomery & Co. were named as the consignees, it was with the knowledge that the

or transportation to a foreign country was not liable for nage, or injury thereto when caused by carriers parties to

this consignee the right to ıe destination, and with the e that the law put upon it ial carrier) the burden of ɔr damage to the shipment, vas sustained, whether the vas caused by the defendant onnecting carrier. The des- vas changed from Richmond :a by the consignees. The was carried from the point ı—Moorefield, W. Va.,—to Ga., under one contract, the ling issued by the defendant and the shipment moved hrough rate of freight from : of origin to Atlanta, the ination, as appears from the ill. If the defendant, or its n, had delivered the ship- Richmond, demanded a sur- f its bill of lading, there col- e freight charges due it, and r a new bill of lading had ıed for the shipment from d. Va., to Atlanta, then there ve been a new shipment, and oad issuing this second bill ɛ at Richmond would have initial carrier of the ship- m Richmond to Atlanta. In ıection see Myers v. Norfolk ı R. Co. (N. C.) 88 S. E. 149. r the evidence, adduced, the tract made was by the de- company, as represented by of lading. The shipment rom Moorefield, W. Va., to Ga., under that bill of lad- freight was paid in Atlanta transportation not merely chmond to Atlanta, but for e journey from Moorefield to

"Learned counsel for the plaintiff in error cite the case of Parker-Bell Lumber Co. v. Great Northern Ry. Co., 69 Wash, 123, 124 Pac. 389, 41 L. R. A. (N. S.) 1064, as authority for the proposition that the initial carrier is not bound where the property is reconsigned by the consignee. The facts in that case, however, were that a carload of shingles was delivered to the Great Northern Railway for shipment from Sisco, Wash., to Kankakee, Ill. The railroad company issued its bill of lading and routed the shipment over its own line of railway, and the lines of the Chicago, Burlington & Quincy Railroad Company, the Indiana, Illinois & Iowa Railroad Company and the Chicago, Indiana & Southern Railroad Company, which lines together form a continuous line of railway from Sisco, Wash. to Kankakee, Ill. The shipper, without notice to the Great Northern Railway Company, instructed the final connecting carrier named in the bill of lading and over whose line the shipment arrived at Kankakee, to divert the shipment to Palisades Park, N. J. That carrier, upon receiving such instructions, issued a new bill of lading, reciting the shipment of the carload of shingles from the Parker-Bell Lumber Co. at Kankakee, Ill., to Palisades Park, N. J., and forwarded the shipment over a new line of connecting railways to its new destination. Under such facts the Supreme Court of Washington held that the Great Nrothern Railway Compan, was not liable for damages to the shingles incurred while they were being transported to the new point

the transportation beyond our ports or borders.[23] The state courts appear to be under the impression that once the contract of carriage has ceased and the liability of the terminal carrier changed from that of an insurer to that of a warehouseman, the liability of the initial carrier ceases, and that an initial carrier is not liable for any breach of duty on the part of the warehouseman.[24] The correctness of this rule may be challenged. The

of destination, to wit, from Kankakee, Ill., to Palisades Park, N. J. Under all the facts of the instant case the defendant railroad company was the initial carrier of the shipment involved, and the appellate division of the municipal court of Atlanta (Fulton section) did not err in overruling the motion for a new trial. Judgment affirmed." B. & O. R. R. v. Montgomery (Ga. 1916), 90 S. E. 740.

In Collier v. Wabash R. Co. (So. 1916) 198 S. W. 696, the court said, p. 970:

"This was an interstate shipment for through transportation, and the fact that each of the three carriers whose lines were employed transported the car under a separate contract did not change the character of the transportation and split it into separate undertakings by each carrier to haul the car only to the end of its own line. There is no merit in the suggestion that, so far as the Wabash Company is concerned, Mexico was the destination of the car, and the obligation of that carrier was fully performed when it left the car in its own yards instead of switching it to the transfer track. Where property is delivered to a carrier to be transported on a continuous trip to a point beyond the limits of the state where delivered, the character of interstate commerce attaches thereto, and it is immaterial whether the shipment be made on a through contract or upon separate contracts issued by each carrier employed in the transportation. Bailey v. Railroad, 184 Mo. App. loc. cit. 462, 171 S. W. 44; Conley v. Railroads, 192 Mo. App. 534, 183 S. W. 1111; Terminal Co. v. Interstate Commerce Com., 219 U. S. loc. cit. 527, 31 Sup. Ct. 279, 55 L. Ed. 310; Commission Co. v. Worthington, 225 U. S. 108, 32 Sup. Ct. 653, 56 L. Ed. 1004; Railway v. Railroad, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215."

23. Brunswick - Balke - Collender Co. v. T. S. & M. Ry., 44 I. C. C. 598, 600.

24. Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 162 N. Y. S. 549.

Where a bill of lading provided that property not removed by the party entitled to receive it within 48 hours after notice of its arrival may be kept in the car, depot, or place of delivery of the carrier, or warehouse, subject to charge for storage and to the carrier's responsibility as warehouseman only upon the failure of a consignee to remove goods within 48 hours after notice from a connecting carrier, the liability of the initial carrier as carrier ceased. Dodge & Dent Mfg. Co. v. Pennsylvania R. Co,. 162 N. Y. S. 549.

liability of the initial carrier for any default occurring anywhere during the transportation is a liability imposed by section 20 of the Interstate Commerce Act. The Supreme Court of the United States has held that the liability of the carrier which holds the goods as a warehouseman is not governed by the state law, but by the federal law.[25] It also has held that the provisions of section 20 of the Interstate Commerce Act inure to the benefit of the carrier in its capacity as warehouseman as well as in its capacity as an insurer.[26] Logically, if the benefits of the Interstate Commerce Act are applicable to the carrier in its capacity as warehouseman the detriments of the same legislation must also be assumed. Furthermore, section 1 of the Interstate Commerce Act in defining "transportation" includes in that term storage. It cannot be denied that warehousing is as much a part of transportation as is reconsignment, demurrage, elevation, switching, ventilation, or refrigeration. It can well be argued that since "storage" is expressly included as a part of the "transportation" which the carrier is bound to furnish under the Interstate Commerce Act, the liability of the initial carrier continues until the "transportation" is completed. True, its liability can shift from that of an insurer to that of a warehouseman, but that need not render inapplicable and defeat the purpose of section 20. While this view is not upheld by the recent state decisions, it is, nevertheless, submitted that the initial carrier is liable under the Cummins Amendment for a loss to the goods which occurs while in the possession of the terminal carrier and while that carrier is acting only as a warehouseman. Of course the liability of the initial carrier can be no broader than that of the terminal carrier. It would not be liable as an insurer if the terminal carrier is only liable as a warehouseman.

5. Connecting Carrier. The Cummins Amendment and its predecessor, the Carmack Amendment, does not and did not relieve the connecting carrier from liability for injury caused by it to the goods. In other words the remedy against the initial carrier is not exclusive. The only difference is that when suit

25. So. Ry. v. Prescott, 240 U. S. 632, 60 L. ed. —, 36 Sup. Ct. 469.

26. Cleveland C. C. & St. L. Ry. v. Dettlebach, 239 U. S. 588, 60 L. ed. —, 36 Sup. Ct. 177.

is brought against the connecting carrier it must be show affirmatively that it caused the loss, but the shipper is nc obliged to seek recourse against only the initial carrier.[27] Bu

27. Collier v. Wabash R. Co. (Mo. 1916), 190 S. W. 969.

Nashville, C. & St. L. Ry. v. Abrahamson-Boone Produce Co. (Ala. 1917), 74 So. 350.

In Stewart Poultry Co. v. Erie R. Co. (Kansas, 1917), 163, Pac. 448, the court said, p. 449:

"But the defendant contends that, under the Carmack Amendment, the plaintiff's cause of action, if any, was against the initial carrier, the Santa Fe Railway. This contention is based on the continuity of carriage from Winfield to New York, and on that provision of the Carmack Amendment which provides that the initial carrier shall be liable to the holder of the bill of lading for any loss, damage, or injury caused by it, or by any common carrier over whose lines the shipment may pass. If there is any liability, there is no question about the right of the plaintiff to proceed against the Santa Fe under the Carmack Amendment; but the last clause of that part of the amendment which makes the initial carrier liable reads: 'Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' Act June 29, 1906, 34 U. S. Stat. c. 3951, p. 595, § 7, par. 11 (U. S. Comp. St. 1913, § 8592). Prior to the Carmack Amendment, there was no question about the right of one who had sustained damage, by reason of the negligence of a carrier, to proceed against the carrier that caused the damage, although it was not the initial carrier. In Cincinnati & Pacific Ry. v. Rankin, 241 U. S. 319, 326, 36 Sup. Ct. 555, 558 (60 L. Ed. 1022), the Supreme Court, discussing the Carmack Amendment, said: 'Construing the Carmack Amendment, said through Mr. Justice Lurton the case cited [Adams Express Co. v. Croninger] 226 U. S. pp. 506, 507 Sup. Ct. 148, 152, 57 L. Ed. 314, L. R. A. (N. S.) 257]: "The liability thus imposed is limited to loss, injury or damage caused by a succeeding carrier to whom property may be delivered,' and plainly implies a liability for such default in its common-law duty as common carrier." Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line'."

In Southern Ry. Co. v. Avoy, (R 1917) 191 S .W. 450, the court sa p. 464:

"Under the Carmack Amendme the initial carrier is made responsi for the entire loss or damage, irrespective of whether the loss or damage occurred upon its line or the of some subsequent carrier. Charleston & Western C. Ry. Co. v. Va ville Fur. Co., 237 U. S. 597, 35 St Ct. 715, 59 L. Ed. 1137, Ann. C 1916D, 333; Atlantic Coast Line Riverside Mills, 219 U. S. 186, 3 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R A. (N. S.) 7; Hudson v. Chicago St. P., M. & O. Ry. Co. (D. C.) 2 Fed. 38.

.oes this prevent the shipper ing and recovering from an iate carrier? Does the act ress confine the remedy or igainst the initial carrier This question has often other states, but seems not been passed upon in this on. The proviso in the Car-:t, which says, 'Nothing in .on shall deprive any holder receipt or bill of lading of :dy or right of action which under existing law,' would o enlarge and extend the existing at the time of the t of the measure in 1906 by complete remedy against the arrier, while taking away t already existed against in-:e and subsequent carriers. Supreme Court of the United is construed this proviso to ly such remedy or right of ; existed under the federal itutory or common, at the the passage of the measure, such remedy or right of ac-the shipper had under the v. So construed, the act shipper the right of recov-the whole loss or damage , against the initial carrier, the loss or damage occurred line or not, but this right extend to connecting or in-e carriers, even though the so provides when the ship-interstate. Adams Express roninger, 226 U. S. 491, 33 148, 57 L. Ed. 314, 44 L. R. S.) 257; Missouri, Kansas ty. Co. v. Harris, 234 U. S. up. Ct. 790, 58 L. Ed. 1377, 1915E, 942.

mmon law a carrier for hire irer of the safe delivery, and the shipper has a right of action against each carrier in a line in turn for the damage occurring upon its division, but not for that occurring upon a line of a predecessor or a successor in the route. The rule laid down by the Supreme Court of the United States, and now generally followed throughout the several states in construing the Carmack Amendment, is that a shipper has a complete remedy against the initial carrier for all loss or damage sustained, and he need join no subsequent carrier. Or, he may have his remedy against an intermediate carrier for loss which occurred upon its line only, but not for any loss occurring otherwise, and in such a case the burden is upon the shipper to show, not alone the damage, but that it occurred upon the line of the defendant, and not upon one of its connecting lines; and his recovery will be limited to such loss or damage as he thereby sustained. Although the proofs fully show the damage, yet the plaintiff will fail, against an intermediate or subsequent carrier, unless it be shown that the defendant occasioned the loss or damage. But an intermediate carrier is, of course, liable for loss or damage which results from negligence while in its care. Atlantic C. L. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019."

In C. N. H. & D. Ry. v. Quincey (Ga. 1917), 91 S. E. 220, the court said, p. 221:

"The sole question for determination by this court is whether or not, under the Carmack Amendment of June 29, 1906, to the Hepburn Act of February 4, 1887, a connecting carrier of an interstate shipment of freight may be sued on its common-

law liability where it is expressly alleged that the injury complained of was committed by such defendant.

"The provisions of the Carmack Amendment, pertinent to an understanding of the question involved in the present case, are as follows:

"'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' 34 Stat. at L. 584, 595, c. 3591, Comp. Stat. 1913, §§ 8563, 8592.

"Congress having, by this act, intended to take possession of the subject-matter of interstate shipments, its law is paramount as to all transactions covered by the act, and the decisions of the Supreme Court of the United States construing it are, of course, binding upon the state courts; but, as pointed out by this court in the case of A. C. L. Ry. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019, the act of Congress, in making the initial carrier liable for damage to goods on any portion of the route, created no new remedy, but is merely declaratory of the common law as enforced in this state. The shipper, as there stated, could always have exercised his rights to sue the initial carrier, and he could have always exercised his right to bring his action at common law against the road actually at fault. Thus, the federal act was designed, primarily to fix the liability under the contract of affreightment, and make the rules governing same uniform throughout the several states. There appears to have been some misapprehension growing out of the misinterpreations of a ruling of the Supreme Court of the United States in the case of Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, in which reference was made to the question here involved, but in the later case of C., N. O. & T. P. Ry. Co. v. Rankin, decided by that court and reported in 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, Mr. Justice McReynolds, speaking for the court, said: 'Properly understood, neither this [referring to the case of Adams Express Co. v. Croninger, supra], nor any other of our opinions, holds that this amendment has changed the common-law doctrine theretofore approved by us in respect to a carrier's liability for loss occurring on its own line.' In the recent case of Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co. 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, carried from this court to the Supreme Court of the United States, the court, in its opinion rendered by Mr. Justice Hughes, said:

"'There are only two questions presented here, and these are thus set forth in the brief for the plaintiff in error: First, That the plaintiff's exclusive remedy was against the initial

ıe Baltimore & Ohio South-
Railroad Company, under the
Amendment of section 20 of
urn Bill. * * * The first
n is met by repeated deci-
this court. The connecting
ı not relieved from liability
armack amendment, but the
ıding required to be issued
ıitial carrier upon an inter-
ipment governs the entire
ation, and thus fixes the ob-
of all participating carriers
xtent that the terms of the
lading are applicable and

doctrine thus appears to be
ɡnized and fully established
upreme Court of the United
It has also been followed by
ɜme Court of this state in the
W. & A. Ry. Co. v. White
ı Co., 142 Ga. 246, 82 S. E.
hich the following language
: 'It was contended that the
: could be maintained at all,
ıve been brought against the
:, Chattanooga & St. Louis
because, by the amendment
(U. S. Comp. St. 1911, p.
ɔove referred to, the initial
ras made liable. But it was
provided in that amendment
hing in this section shall de-
y holder of such receipt or
ding of any remedy or right
which he has under existing
he wrong here complained of
mitted by the defendant, not
itial company, and the plain-
ɔt excluded from suing the
er.'

ule here given was distinctly
ɛd in the case of A. C. L. Ry.
Thomasville Live Stock Co.,
nd the interpretation there
l as to the common-law

remedy has never been altered by any decision of this court. Furthermore, there are various decisions, rendered by different state courts of last resort, which plainly follow the rule herein adopted; for example, in the case of Elliott v. Chicago, etc., 35 S. D. 57 N. W. 777, the following language is used:

" 'The Carmack Amendment merely places the shipper in a position where he may be able to recover for injured property and relieve himself, oftentimes, from the task of locating the active tort-feasor. But if the shipper knows which one among a number of carriers caused the injury, he may sue that one alone.'

"In Baltimore, C. & A. Ry. Co. v. William Sperber & Co., 117 Md. 595, 84 Atl. 72, the court said: 'The Carmack Amendment of June 29, 1906, to the Hepburn Act, making an initial carrier liable for damage * * to his shipment upon the line of the connecting carrier, is intended merely to give a cumulative remedy, and does not prevent the shipper from maintaining an action against the connecting carrier at fault.'

"In the case of Varnville Furniture Co. v. C. & W. C. Ry. Co., 98 S. C. 63, 79 S. E. 700, the following language was used by the court:

" 'The federal statute does not limit the right or remedy of the holder of the bill of lading, in case of loss or damage, to an action against the initial carrier receiving property for interstate transportation. While it says that that carrier shall be liable, on the principle that succeeding carriers in the route are its agents, it does not say that it alone shall be liable, or that the holder of the bill of lading shall pursue that carrier alone. * * * To hold that the

the Carmack Amendment does not make a carrier liable for the default of a preceding carrier.[28] Under the Carmack Amend-

initial carrier alone is liable to the holder of the bill of lading would, in many cases, cause the very expense and inconvenience which the statute was designed, in part, at least, to obviate.'

"Thus it appears that the rule indicated, as laid down by the Supreme Court of the United States and followed by the Supreme Court of the state and by this court, is fortified by the rulings of various courts of highest resort in other states. Judgment affirmed."

The fact that a connecting carrier accepted a shipment of mules, knowing that they were unaccompanied by a caretaker, and negligently failed to care for them, fixed its liability and rendered the question of refusal of the initial carrier to allow the shipper to accompany the shipment immaterial, the admission of evidence relative to the initial carrier's refusal to permit the shipper to accompany the stock was harmless. Chicago, I. & L. Ry. Co. v. Priddy, (Ind. 1917), 115 N. E. 266.

Each carrier connected with an interstate shipment is liable for loss or damage to goods transported caused by its own negligence, notwithstanding that the Carmack Amendment makes the initial carrier liable to holder of bill of lading for loss or damage caused by any connecting carrier and relieves each connecting carrier of liability for loss or injury caused by any other carrier. Pennington v. Grand Trunk Western Ry. Co., 115 N. E. (Ill. 1917), 170.

Where defendant railway company's delay in furnishing cars for transportation of potatoes shipped on through bill of lading of initial carrier caused damage, it was liable therefor; the Carmack Amendment providing that, while initial carrier shall be liable, this shall not defeat other rights of action. Gallop and Fisher v. Norfolk So. R. R. (N. C. 1917), 915 E., 375.

Where suit is against the connecting carrier, and not against the initial carrier, of an interstate shipment, it is incumbent on plaintiff to allege and prove loss or damage caused by negligence of defendant. Pennington v. Grand Trunk Western Ry. Co., 115 N. E. (Ill. 1917), 170.

Where a connecting carrier is sued for loss and damage of an interstate shipment, the rights and remedies of the shipper are to be determined under the federal laws existing prior to enactment of the Carmack Amendment; but the bill of lading issued by the initial carrier is to be considered under the provisions of the Carmack Amendment as the bill of lading of the connecting carrier, and binding in all of its provisions that are valid and applicable to the suit. Pennington v. Grand Trunk Western Ry. Co., 115 N. E. (Ill. 1917), 170.

A connecting carrier is liable only for such damage or injury to a shipment of goods as is attributable to its own negligence or wrongful act.

28. Higgins & Co. v. C. B. & Q. R. R. (Minn. 1917) 161 N. W. 14[illegible]

As has been shown, although the Carmack Amendment makes the initial carrier responsible for the default of its subsequent connec[illegible]

shipper of goods over connecting lines still has his remnst an intermediate carrier for loss occurring on its line t not for any loss occurring otherwise, and the burden n to show not only the damage, but that it occurred on it's, and not on a connecting line, and his recovery will ed to such loss or damage as he thereby sustained.[29] A

he same rule does not apply onnecting carrier. Thus a carrier is not liable for ie negligence of the initial St. Louis, I. M. & S. Ry. vis (Ark. 1916), 185 S. W.

irmack Amendment makes who receives property for transportation liable for injury to such property beown lines; but it does not arrier liable for the acts of carriers, which may have n loss of, or injury to, such Knapp v. Minneapolis, St. . M. Ry. Co. (N. D. 1916), . 81.

two connecting carriers have themselves made presentaeceipted freight bill, the sole rmly accepted evidence of of the connecting carriers possession of goods on the latform of the intermediate and a loss was sustained fraud or theft, neither may to reject the usage. or mainthe loss should not be borne arrier whose employe was the unexplained loss or conf the receipted bill, which ome person to commit theft. mboat Line v. N. Y. C. & Co., 158 N. Y. S. 1084.

re a shipper sues a carrier alue of certain grain alleged been lost through its neglihile such grain was in the custody and under the control of, and upon certain boats owned and operated by it as a common carrier; and where the evidence shows that such grain was lost while in the possession of a preceding carrier, and before the shipment had been delivered to or received by the defendant, the claimant cannot be permitted to introduce evidence tending to show, or recover upon the theory, that the carrier by special agreement had assumed responsibility for the safety of such shipment while in custody of, and being transported by, such preceding connecting carrier. Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co. (N. C. 1916), 159 N. W. 81.

However, the Carmack Amendment does not prevent a connecting carrier from being responsible for damages due to its own negligence but, where a suit is brought against an intermediate carrier, the plaintiff must affirmatively show that the injury was occasioned by such carrier. Prelvitz v. Chicago & Great Western R. R. Co. (Minn. 1916), 157 N. W. 1079, 1080.

No recovery can be had against connecting carrier for damage to live stock in interstate shipment, where proof conclusively shows the damage was done by the initial carrier. Illinois Cent. A. Co. v. Walker, (Miss. 1918) 77 So. 191.

29. Southern Ry. Co. v. Avey (Ky. 1917), 191 S. W. 960.

connecting carrier in an interstate shipment of a car of poultry is liable directly to the holder of the bill of lading for the damages caused by negligence in transporting the car over its road, where the loss sustained has been caused by a decrease in the market price of poultry, although the bill of lading stipulated that the carrier was not bound to transport the car in time for any particular market.[30] An intermediate connecting carrier which made an oral contract for a through shipment of goods is liable thereunder for damages to such shipment occurring on a connecting line, where it had notice when it accepted the shipment that the special damages pleaded would result from delay in shipping.[31] It might not be amiss to state that the previous decisions of the Georgia courts to the effect that the remedy against the initial carrier is exclusive and that a connecting carrier cannot be sued has been expressly overruled in that state.[32]

6. **Delivering Carrier.** As has been seen, under the Carmack Amendment the shipper is not restricted to sue the initial carrier alone. He may sue any intermediate or connecting carrier. The only requirement is that if he does so he must prove that the loss occurs on the line of such carrier and through its fault. It may, therefore, be stated as the law that the Carmack Amendment does not exempt from liability, expressly or by

It was admitted that the damage was caused from the freight, potatoes in sacks, being loaded in cars in which the wood of the bottoms was permeated with salt. These cars were furnished by a prior carrier, and the potatoes transported in them over the line of such carrier and delivered to defendant, a connecting carrier, which continued the shipment to its destination on its line. The unsuitable character of the cars was not discoverable by defendant on any reasonable inspection. It is *held* that the duty of defendant when it received the cars from the connecting carrier was to use due care, skill, and diligence in inspecting them, that it would be liable for a breach of such duty, but not for a defect which was unknown to it and not discoverable by the exercise of due care, skill, and diligence. Higgins & Co. v. C. B. & Q. R. R. (Minn. 1917), 161 N. W. 145.

30. Stewart Poultry Co. v. Erie R. Co. (Kans. 1917), 163 Pac. 448.

31. Gulf, C. & S. F. Ry. Co. v. Nelson (Tex. 1917), 192 S. W. 1056.

32. Central of Georgia Ry. Co. v. Waxelbaum, 18 Ga. App. 489, 89 S. E. 635. See, also, Cincinnati, Hamilton & Dayton Ry. Co. v. Quincey, 19 Ga. App. 167 (91 S. E. 220), Morris v. Southern Ry. Co. (Ga. 1917), 91 S. E. 878.

cation, the terminal carrier or any other. Hence if any conng or terminal carrier actually damaged the shipment it is : to the shipper for any injury it causes.[88] Suits against

Eastover Mule & Horse Co. C. L. R. Co., (S. Car.), 83 S. ', 600; A. C. L. R. R. v. Thom- Live Stock o., (Ga. 1913), 78 1019.

ommon-law action against the several connecting carriers, to r for injury or damage to a ent of freight in the course of ate transportation, where the or damage complained of was l by the negligence of the last ting carrier, is not prohibited terms of Act. Cong. June 29, 34 Stat. 595, c. 3591) § 7, pars. 2, known as the Carmack dment to the Hepburn Act, atory of Act Feb. 4, 1887 (24 386, c. 104, § 20 [U. S. Comp. 16, §§ 8604a, 8604aa]). Under nendment the lawful holder of l of lading issued by the initial for freight to be transported rstate commerce may maintain mmon-law action against any several connecting carriers for injury on its own line. Cini, etc., Ry. Co. v. Rankin, 241 319, 36 Sup. Ct. 555, 60 L. Ed. . R. A. 1917A, 265.

ouisville & N. R. Co. v. Lynne 1916) 71 So. 338, the court . 339:

e act of Congress known as the ck Amendment of the act of 29, 1906 (Fed. St. Ann. Supp. pp. 273, 274), although it pre- and extends the liability of carriers of interstate shipments, not abrogate nor in any way the separate liability of ter- or delivering carriers for losses occurring on their own lines, as fixed by the statutes or decisions of the several states. That act makes the initial carrier responsible for the safe delivery of shipments over connecting lines, no matter where the loss may occur, but it certainly does not exempt connecting lines from direct responsibility to the owner for their own failure to safely carry and deliver goods received by them for that purpose. This being the liability of the carrier in this case, the burden was on the shipper to show that his goods were lost or diverted while in the custody of the carrier. By showing the carrier's delivery to him of a part of the original shipment, a presumption arose of its receipt by the carrier in the same condition as when delivered to the initial or a preceding carrier, which imposed upon the carrier the burden of showing that missing goods were not lost while in its custody. South Exp. Co. v. Saks, 160 Ala. 621, 49 So., 392."

A terminal carrier is not relieved from liability for misdelivering an interstate shipment by the provisions of the Carmack Amendment, making the initial carrier liable for loss or damage occurring anywhere en route, with a remedy over against the carrier at fault, but the bill of lading which the initial carrier under that statute must issue governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co. 36 Sup.

intermediate carriers are practically unknown and the reason for this is very apparent when the obligations of every class of carrier are analyzed. The initial carrier is sued because a statutory liability is imposed. Once it is proven that a shipment is delivered in good condition to the carrier and that the shipment was delivered at destination in a damaged condition, or not delivered at all, a prima facie case is immediately made out against the initial carrier. Where the delivering carrier is sued much the same facts will permit recovery. The presumption of the law is that the delivering carrier receives the goods in the same condition as its connecting carrier received them. If the goods are shown to be in good condition when delivered to the initial carrier, the presumption of the law is that they were in the same condition when delivered to the terminal carrier and hence any damage or loss is deemed to have occurred on the line of that carrier; and it should be noted that the Carmack Amendment has not modified the rule of law that a connecting carrier is presumed to have received the shipment in good condition and would not have received the shipment had the contents been in bad condition, without making some notation to that effect and protest. Therefore, where the shipper of live stock shows that the stock was in good condition when delivered to the initial carrier he can recover from the terminal carrier for damage. It is the business of the terminal carrier to prove that it did not cause it.[34] So where the delivering carrier is sued for injury to

Ct. Rep. 541; 241 U. S. 190; 60 L. Ed., citing many U. S. Supreme Court cases. Also see T. W. Mewborn & Co. v. Louisville & N. R. R. (N. C. 1915), 87 S. E. 37.

34. Eastover Mule & Horse Co. v. A. C. L. R. Co. (S. Car.), 83 S. E. 599, 600.

Under the Carmack Amendment, a railroad receiving potatoes from a steamboat company to which the shipper had delivered them, and furnishing the car in which they were loaded for interstate shipment, and negligently failing to prepare for such shipment, so that the potatoes were damaged, was liable. Aydlett v. Norfolk-Southern R. R. (N. C. 1916), 89 S. E. 1000; also see Prelviz v. C. G. W. R. R. (Minn. 1916), 157 N. W. 1079.

The burden rests upon it, the delivering carrier, to show that the injury occurred without its fault or negligence. Tothe extent of involving it, the delivering carrier, in the liability of a common carrier after the goods shall have come to its custody, the initial or receiving carrier of the goods had such authority. The bur-

goods, the almost universal rule is that, in the absence of evidence locating the place of damage to goods in transit over several connecting lines, a presumption arises, where goods are

den of proof in cases of loss or injury rests upon the carrier to exempt itself from liability, the law imposing the obligation of such duty upon it. The carrier, almost without exception, will be able to show the condition of the property when reaching its custody; the shipper or consignee can rarely, if ever, do so. This is a salutary rule, resulting in justice to the greatest number affected, leaving it also to the party to prove the fact in whose power it expressly lies. St. L. & S. F. R. Co. v. Akard (Okla. 1916), 159 Pac. 344.

Under separate contracts for the shipment of live stock, limiting the carriers' liability to injury to the cattle on their respective lines, the terminal carrier could not be charged with the negligence of a connecting carrier. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

In an action for value of goods taken on execution against the shipper in favor of his consignee, the liability of the initial carrier is to be tested by that of the terminal carrier. Hamilton Mill & Elev. Co. v. Stephenville, N. & S. T. Ry. (Tex. 1916), 189 S. W. 774.

A terminal carrier is not relieved from liability for misdelivering an interstate shipment by the provisions of the Carmack Amendment, making the initial carrier liable for loss or damage occurring anywhere enroute, with a remedy over against the carrier at fault, but the bill of lading which the initial carrier under that statute must issue governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. Georgia, F. & A. R. Co. v. Blish Milling Co., 36 Sup. Ct. 541.

The receipt of goods in a damaged condition raises a presumption of the delivering carrier's negligence. St. Louis, I. M. & S. Ry. Co. v. Cunningham Commission Co. (Ark. 1916), 188 S. W. 1177.

In an action for damages to a shipment of thoroughbred horses, where the evidence showed that the stock was in good condition when delivered to defendant railroad, a connecting carrier, and that it was badly damaged and bruised upon arrival, there was a presumption of negligence, and it developed upon the defendant, in order to relieve itself from liability, to show, not only the way in which the car was handled while in transit, but whether handled or not. Illinois Cent. Ry. Co. v. Mahon Live Stock Co. (Miss. 1916), 71 So. R. 802.

Where the contract of shipment provided for delivery on the shipper's order and instructed the terminal carrier to notify the consignee of arrival of a car of oats, and the shipper deposited the bill of lading with draft attached, indorsed in blank, in the bank, which placed the amount of the draft to the credit of his checking account, but the terminal carrier in another state had no knowledge of such transaction, and the consignee refused the oats and protested the draft, and the shipper then repurchased the draft and bill of lading, and instructed the terminal carrier

delivered to the initial carrier in good condition and are delivered by the terminal carrier in a damaged condition, that they were injured on the line of the last carrier, and the burden of proof is

to deliver the oats to a broker, and it so delivered them, but more than 48 hours after arrival, and after such delivery the broker secured judgment by default against the shipper for $50 less than the value of the oats, the difference being adjusted by stipulation, the shipper could not, as a matter of law, recover from the initial carrier the value of the oats. In such action, the terminal carrier was liable only as a warehouseman, and not under the Interstate Commerce Act. Hamilton Mill & Elev. Co. v. Stephenville, N. & S. T. Ry. Co., 189 S. W. 774. But in this case the contract of shipment provided that after 48 hours the liability of the railroad was to be that of a warehouseman only.

In the absence of any evidence to the contrary, the presumption is that damage or loss of goods during shipment occurred while in the possession of the last carrier. Zervilli v. Ross (Mo. 1917), 198 S. W. 487.

The Carmack Amendment does not take away the remedy of the owner of property against the terminal carrier for loss or damage to his property while in its possession. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

The liability of connecting and terminal carriers, except in the instances named in the Carmack Amendment, is that given by the common law. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

The only effect of the Carmack Amendment, as applied to connecting or terminal carriers, is to give them the benefit of all lawful conditions or provisions in the contract made by the shipper with the initial carrier. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

When cattle in good condition are delivered for shipment over the lines of several connecting common carriers, and upon delivery are injured and some of them dead, the presumption is that the injury or loss occurred upon the line of the delivering carrier. W. F. & N. W. Ry. Co. v. Benton (Okla. 1917), 167 Pac. 633.

The rule that plaintiff, to make a prima facie case in action against a terminal carrier for damages to goods, need only show good condition of goods when delivered to initial carrier, and damaged condition when received from terminal carrier, is not changed by the Carmack Amendment, for that statute does not raise a presumption that damage occurred while the goods were in initial carrier's possession, but merely makes it immaterial, in action against the initial carrier, where the loss occurred, the initial carrier being made responsible for the acts of all connecting carriers as its agents. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

Where there is evidence that cattle were received by a terminal carrier in bad condition, and there is also evidence of facts and circumstances tending to show negligence upon the part of the terminal carrier, the question of what proportion of the loss or damage, if any, is chargeable to the terminal carrier is one for the

on the terminal carrier, when sued, to show that the damage was not done on its line, or, if done, that it occurred without its fault,

jury. W. F. & N. W. Ry. Co. v. Benton (Okla. 1917), 167 Pac. 633, 634.

In W. F. & N. W. Ry. Co. v. Benton (Okla. 1917), 167 Pac. 633, 634, the court said, p. ——:

"The sole question is whether the evidence supports the verdict. Complaint is made of the instructions, but upon examination we are of opinion that they fairly conform to the principles hereinafter referred to. The rule of law applicable is found in St. L., I. M. & S. v. Carlile, 35 Okla. 118, 128 Pac. 690, where, after reviewing the previous authorities, it is said:

"'When the goods shipped, upon reaching their destination, are found to be injured or some of them lost, the presumption is that such injury or loss occurred on the line of the delivering carrier; and there is no presumption that the injury or loss occurred while the goods were in the hands of the initial carrier.'

"In C., R. I. & P. R. Co. v. Harrington, 44 Okla. 41, 143 Pac. 325, we said: 'The Carmack Amendment to the Interstate Commerce Law, * * imposing liability on an initial carrier for loss, damage, or injury to property occurring anywhere on the through route, did not abrogate the rule of evidence that property received in good order by the initial carrier is presumed to have been received in like good order by the succeeding carrier, and that final delivering in bad order raises a rebuttable presumption that the injury occurred on the delivering carrier's line.' When, therefore, plaintiff introduced evidence tending to show, as he did, shipment in good order, and proved that the cattle were injured, dead, and dying when delivered by defendant, he established a prima facie case. Armstrong, Bryd & Co. v. L.. Cent. Ry. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A. (N. S.) 671. Defendant then introduced evidence showing that the cattle were in bad condition when received by it. This was proper as a rebuttal of the presumption. But who is to determine when the presumption is overcome? Is the effect of plaintiff's evidence a question of law for the court, or of fact for the jury? Undoubtedly the weight of the evidence is for the jury, and consequently they must determine when sufficient evidence has been introduced to overcome the presumption which the law implies. Michie on Carriers, p. 3398, and cases cited. Their determination approved by the trial court under our unbroken rule could only be disturbed where we could say that there was no evidence reasonably tending to support it. And see Parnell v. Atlantic Coast Line Co., 91 S. C. 270, 74 S. E. 491."

This presumption may be rebutted by evidence showing that the cattle when received by the delivering carrier were in bad condition. When such evidence is introduced, the presumption, on the one hand, and the rebutting evidence, on the other, ordinarily form an issue of the fact for the determination of a jury. W. F. & N. W. Ry. Co. v. Benton (Okla. 1917), 167 Pac. 633, 634.

The determination of such issue of fact against the terminal carrier ap-

proved by the trial court ought not to be disturbed by this court unless the rebutting evidence is so conclusive that we can say that the finding of the jury has no evidence reasonably tending to support it. W. F. & N. W. Ry. Co. v. Benton (Okla. 1917), 167 Pac. 633, 634.

In the absence of any evidence to the contrary, the presumption obtains that the other carriers safely transported the property over their respective lines, and that the damage or loss occurred while the goods were in the possession of the last carrier, to-wit, the defendant. See Bockersman v. St. L. & H. R. Co., 169 Mo. App. 168; 152 S. W. 389, and cases cited. Zerilli v. Ross (Mo. 1917), 198 S. W. 487, 488.

In Ft. W. & D. C. Ry. Co. v. Bone (Tex. 1917), 195 S. W. 244, the court said, p. 245:

"The next proposition under the assignment is that the evidence does not show the goods were damaged on appellant's road. The agent of the appellant testified that the waybill issued by it shows the goods were received in good condition, and that when goods are received by that road, he testified, if there was any indication of damages or bad condition, it is noted upon the bill of lading. The expense bill and waybill has marked on them, 'When received, O. K.' When the two chests of goods were received by appellee they were damaged as found by the jury. They had been wrapped in heavy building paper and crated. The paper showed that it was wet, and from the outside of the crating showed to be damaged. If they had been in that condition when received by appellant, it, under its custom and practice, would have noted the fact. This evidence, in the absence of any testimony to the contrary, will support the verdict. It appears, however, that Mrs. Bone, in writing the appellant, expressed the opinion that the goods were damaged before reaching appellant. This letter clearly shows she knew nothing of the facts, and it was only surmise or conjecture on her part. This was not enough to negative the indorsement that appellant received the goods in good condition."

An agreement as to value and limiting liability in bill of lading covering shipment from Yokohama to New York, issued by a steamship company, was intended to apply to any of the successive carriers, where the bill called for transportation of the goods "from Yokohama, via San Francisco, to New York," and it was denominated a "through bill of lading." Burke v. U. P. R. Co., 166 N. Y. Supp. 100.

Terminal carrier's "O. K." on goods received from connecting carrier, made in accordance with its usual custom, *held* sufficient to show that damage arising before delivery to the consignee occurred while the goods were in terminal carrier's possession, and consignee's statement that she believed damage occurred before defendant received goods was insufficient to rebut the presumption. Ft. W. & D. C. Ry. Co. v. Bone (Tex. 1917), 195 S. W. 244.

The carrier is liable for the consequences of its failure to observe directions given by claimant to unload in certain stockyards due to its negligence. C. R. I. & G. Ry. Co. v. Jenkins (Tex. 1917), 196 S. W. 679.

Where, in an action for damage or injury, plaintiff's testimony shows that the impairment of the shipment occurred while the goods remained

upon the lines or in the custody of a preceding carrier, and before their delivery to defendant, such evidence on motion should be excluded, and a verdict directed for the defendant. Copenhaver & Massey Milling Co. v. K. & W. V. R. R. Co. (W. Va. 1917), 93 S. E. 940.

While it has really been well settled that the Carmack Amendment did not prohibit a claimant from suing any connecting carrier which might have occasioned the loss, a few of the state courts have still been rather dubious on this proposition. We recently called attention to the fact that so strong had the trend of authority become that the Supreme Courts of Illinois and Georgia reversed their prior decisions, holding that the remedy against the initial carrier was exclusive and had swung into line with the weight of authority. Central of Georgia Ry. Co. v. Yesbik (Ga. 1917), 92 S. E. 527. Under the interpretation placed upon the Carmack Amendment, where a bill of lading is issued by a railroad company for an interstate shipment over several connecting lines of railroad, the remedy under that statute of the holder of the bill of lading for damages caused by delay in transporting the goods is not exclusively against the initial carrier, but extends to all the connecting carriers over the lines of which the goods are transported. The liability is that imposed by the act, as measured by the original contract of shipment so far as it is valid under the act.

The subject has recently received such exhaustive discussion in the Supreme Court of Iowa that we quote exclusively from both the majority opinion holding the remedy is not exclusive against the initial carrier, and also the dissenting opinion, to the contrary.

In Erisman v. C. B. & Q. Ry. (Ia. 1917), 163 N. W. 627, the court said, p. 627, et seq.:

"There are, however, some other questions in the case which are much more troublesome and upon which we are not entirely agreed. While defendant's counsel make no claim that a terminal or connecting carrier may not be liable for loss or damage to goods while in its possession, some doubt has arisen in the minds of some of the members of the court as to whether or not there is or can be any such liability, and also as to the nature of the proof to establish such liability.

"It is conceded, or at least should be, that before the enactment of what is known as the 'Carmack Amendment' to the Hepburn Bill, the terminal carrier was liable, and that all that the consignee need do was to show that the goods, when delivered by him to the initial carrier were in good condition and that when surrendered to him by the terminal carrier were in a damaged condition, casting the burden upon the defendant of showing nonliability.

"The material parts of this Carmack Amendment read as follows:

" 'That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such prop-

erty may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose lines the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.'

"Did the so-called Carmack Amendment change either of these rules? First, then, as to the rule of liability of any save the initial carrier. That it was not the intention of Congress to change the rule as to the liability of a terminal carrier or a connecting one, and that it in fact did not do so, has already been settled by many decisions, including those of the Supreme Court of the U. S., some of them announced before this appeal was taken. See, among others, the following cases: C., N. O. & T. P. Ry. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 55, —— L. Ed. 1022; L. R. A. 1917A, 265; G., —— Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; St. Louis S. W. Ry. Co. v. Ray (Tex. Civ. App.), 127 S. W. 281; K. C. So. Ry. Co. v. Carl, 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56; Bichlmeier v. R. R. Co., 159 Wis. 404, 150 N. W. 508; Eastover Co. v. R. R., 99 S. C. 470, 83 S. E. 599; St. Louis & S. F. R. R. Co. v. Mounts, 44 Okla. 359, 144 Pac. 1037; A., T. & S. F. Ry. Co. v. Boyce (Tex. Civ. App.), 171 S. W. 1095; C., R. I. & P. Ry. Co. v. Harrington, 44 Okla. 41, 143 Pac. 325; Glassman v. C., R. I. & P. Ry. Co., 166 Ia. 254, 147 N. W. 757.

"The rule is announced in the following language by the Supreme Court of the United States in Rankin's Case, supra:

"'Counsel concede liability of a common carrier under the long-recognized common-law rule not only for negligence, but also as an insurer, and that, unless the Carmack Amendment * * * has changed this rule, the railway is responsible for damages not exceeding specific value. But they insist that in Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, we held this amendment restricts a carrier's liability to loss "caused by it." And, consequently, they say, the trial court erred when it charged: "In this case the carrier is held to the highest degree of care for the safe transportation of the animals." Construing the Carmack Amendment, we said, through Mr. Justice Lurton in the case cited [226 U. S.], pages 506, 507 [33 Sup. Ct., page 152, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257]: "The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier." Properly understood, neither this nor any other of our opinions hold that this amendment has changed the common-law doctrine

'e approved by us in respect
er's liability for loss occur-
s own line.'

in the Blish Milling Co.
ra, that court said:

: are only two questions pre-
re, and these are thus set
he brief of the plaintiff in
(1) That the plaintiff's ex-
medy was against the initial
ıe Baltimore & Ohio South-
Railroad Company, under
ack Amendment of Sec. 20
epburn Bill (34 St. at L.
). 3591, Comp. Stat. 1913,
(2) That, under the stipu-
the bill of lading providing
ling of claims for loss or
he action was barred." The
ention is met by repeated
of this court. The connect-
r is not relieved from lia-
the Carmack Amendment,
ill of lading required to be
the initial carrier upon an
shipment governs the en-
)ortation, and thus fixes the
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ıe extent that the terms of
f lading are applicable and
'he liability of any carrier
ute over which the articles
ed, for loss or damage, is
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iginal contract of shipment,
it is valid under the act."
ity Southern R. Co. v. Carl,
639, 648, 33 Sup. Ct. 391,
683, 686. See Adams Ex-
v. Croninger, 226 U. S. 491,
33 Sup. Ct. 148, 57 L. Ed.
321, 44 L. R. A. (N. S.)
eland, C., C. & St. L. R. Co.
ach, 229 U. S. 588, 591, 36
77, 60 L .Ed. 453; Southern
Prescott, 240 U. S. 632, 637,
Ct. 469 [60 L. Ed. 836];
Northern P. Ry. Co. v. Wall, decided
April 24, 1916 (241 U. S. 87, ante,
493, 36 Sup. Ct. 493 [60 L. Ed. 905]).'

"It will be noticed that this act does not either expressly or by implication, exempt the terminal or any other carrier from liability. Indeed, the contrary appears. In the first place, the amendment reserves to the holder of a bill of lading any remedy or right of action which he has under existing law; and, second, the carrier on whose line the loss occurs is expressly made liable to the initial carrier for any damages it may have been required to pay to the owner of the property. Surely, the remedy of the owner against the terminal carrier for loss or damage to this property while in its possession has not been taken away by this Carmack Amendment. It can hardly be conceded that Congress intended to take away from owners of goods shipped into this state the right to sue a terminal carrier for damages done while in transit, and to provide him a remedy only against the initial carrier, which may be a line of road operating in some remote state. If this was the intent of Congress, the act itself is a delusion and a snare.

"The object of the act was to settle the law applicable to interstate commerce, which theretofore had been in considerable confusion as to the liability of initial carriers in the shipment of goods in interstate commerce, and to make it responsible for the acts of all connecting carriers (thus making these connecting carriers its agents); and also to provide a statutory rule permitting recovery back by the initial carrier from the company, on whose line the loss, damage, or injury was sustained, of the amount of the loss or damage.

The statute was aimed at initial carriers, and was not intended to apply to connecting or terminal ones, save as it made them responsible to initial carriers for damages occurring on their own lines. No cases have been cited which hold that there is no remedy against a connecting or terminal carrier, and we do not think any can be found. The cases cited clearly settle the liability of terminal carriers.

"What is the basis of liability of a terminal or connecting carrier? Is it a state statute, or a rule of common law recognized and enforced by all courts, both state and national? While there may be no national federal common law as such, yet federal courts recognize the common law of the several states, and in some instances undertake to declare it for themselves, even to the extent of saying that a state court has misinterpreted it; and reversals are not uncommon because the state court did not correctly decide the common-law rule. The liability of a carrier, in the absence of statute, is that given by the common law, and, if the statute be merely declaratory of the common law, it is recognized and enforced by all courts as such. So that the liability of connecting and terminal carriers, except in the instances named in the Carmack Amendment, is given by the common law, and that law has always been recognized and enforced by the federal courts, and is in harmony with the common law of the several states. See New Jersey Nav. Co. v. Merchants' Bank, 6 How. 345, 12 L. Ed. 465; Hutchinson on Carriers (3rd Ed.), vol. 1, § 236, and cases cited: 4 Ruling Case Law, 947; Beard & Sons v. Ill. Cent. R. R. Co., 79 Ia. 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381. Also Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Western Union Co. v. Call Publishing Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765. But for the adoption of the Carmack Amendment, it would not be contended that an action to enforce liability against a terminal carrier would not lie, even were there no statute or state decision upon the subject.

"This liability is not founded on a local satute nor is in any manner dependent thereon. It exists because of the duty resting upon a common carrier, a duty enforced by all the courts of the country, the same as any other common-law obligation. The Carmack Amendment expressly provides that nothing therein shall deprive any holder of a receipt or bill of lading of any remedy or right of action he may have under existing law. What is meant by this exception? Surely some rights under existing laws are saved to the shipper, and, even if it be held that it refers to federal laws, the rule of liability of a terminal carrier has been recognized and enforced by the federal courts as a part of the general law of the land. If this be not true, then it is pertinent to inquire what rights under existing laws were preserved by the exception found in the Carmack Amendment. There was and is no federal statutory law upon the subject save as it may have been enacted by this Carmack Amendment; and as the federal Supreme Court has expressly held that the obligations of connecting and terminal carriers are not affected by this act, save as it makes them expressly liable in some instances to the initial carriers, then, according to well-known rules of construction, Con-

ıst have been content with applied and enforced by the ırts on the subject of this for it did not attempt to r change therein. Speaking ɔint, Chief Justice White in R. R. Co. v. Abilene Oil Co., . 437, 27 Sup. Ct. 354, 51 L. 9 Ann. Cas. 1075, said:

atute will not be construed ; away a common-law right ıt the date of its enactment, at result is imperatively re- :hat is to say, unless it be at the pre-existing right is nant to the statute that the ɔf such right would in effect he subsequent statute of its in other words, render its s nugatory.'

ıs further supporting these C. Ry. Co. v. Carl 227 U. S. ;up. Ct. 391, 57 L. Ed. 683; W. Ry. Co. v. Ray (Tex. .), 127 S. W. 281; Atchison, F. R. Co. v. Word (Tex. .), 159 S. W. 375; Missouri, Ry. Co. v. Ward (Tex. Civ. 9 S. W. 1035.

ɔnly effect of the Carmack ent, as applied to connecting ıal carriers, is to give them fit of all lawful conditions ions in the contract made by ıer with the initial carrier. ıe effect of all the decisions made by the Supreme Court ıted States. It is said, how- at these suggestions run to the rules announced in Croninger, 226 U. S. 504, 33 148, 57 L. Ed. 314, 44 L. R. S.) 257. As we read that ; in line with our own con-

We quote the following t case:

· to that (Carmack) Amendment, the rule of carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States (Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717), or that determined by the supposed public policy of a particular state (Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268), or that prescribed by statute law of a particular state (Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688).'

"The author of that opinion, in referring to the proviso found in the Carmack Amendment, held that the words 'existing law' meant the general common law, as declared by that court, and not the supposed public policy of a particular state, or that prescribed by statute law of a particular state. He said: 'To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would * * * destroy the act itself.'

"Again he said:

"'One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for

which the first carrier might have been made liable.'

"Again, in B. & M. R. Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450 Ann. Cas 1915D, 593, the court said:

"'The subject of interstate transportation of property has been regulated by federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation. * * * That by the Carmack Amendment * * * the subject-matter of the liability of railroads under bills of lading issued for interstate freight is placed under federal regulation, so as to supersede the local law and policy of the several states, whether evidenced by judicial decision, by statute, or by state Constitution. * * * That in matters not covered by its own express terms it had the effect of establishing the common-law rules respecting the carrier's liability, as laid down in previous decisions of this court, and adopted generally by the federal courts.'

"To the same effect, see K. C. Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; M., K. & T. R. R. v. Harris, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942.

"Coming down to the later cases already referred to, wherein it is expressly held that since the enactment of the Carmack Amendment an action will lie against a connecting or terminal carrier, or that all may be sued jointly as pointed out in Rankin's Case and the Blish Milling Case, supra, it is manifest that the liability of a connecting or terminal carrier is not founded on state statute or on the public policy of any particular jurisdiction, but upon the general common law as declared by the United States Supreme and other federal courts through the Union. See, also, C., C., C. & St. Louis Ry. Co. v. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453.

"As the defendant's liability is predicated, not upon a state statute or the public policy of a state, but upon the general common law as applied by the federal courts, we have next to inquire whether or not the general rule exists that all a shipper need do in the first instance, in an action against a terminal carrier, is to prove that the goods were in good condition when delivered by him to the initial carrier, and in a broken or damaged condition when received by him from the terminal carrier.

"It is well to bear in mind the exact point presented for discussion. We have no occasion to determine what the rule may be in an action against a connecting carrier or in an action by an initial carrier against a connecting or terminal one for subrogation under the Carmack Amendment—with these questions we have nothing to do at this time. The main question here has already been stated; it is plain and clear cut. Ordinarily it would be enough to quote the latest pronouncement of the Supreme Court of the United States upon this subject. In Galveston Ry. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516, that court said:

"'Under the Carmack Amendment, as already construed in the Riverside Mills Case [219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7], wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through contract. It there-

o treat the connecting car- its agents for all purposes ortation and delivery. This ı, must be treated as though : of destination was on its , and is to be governed by rules of pleading, practice, ımption as would have ap- the shipment had been be- tions in different states, but he company's railroad. Thus d, when the holders of the ıding proved the goods had delivered to the consignee, mption arose that they had by reason of the negligence rier or its agents. The bur- roof that the loss resulted ıe cause for which the ini- er was not responsible, in ›y contract, was then cast carrier. The plaintiffs were ed both to prove their case ›rove the existence of a de- he carrier and its agents, eceived possession of the re charged with the duty of ; them, or explaining why not been done. This must ause carriers not only have eans, but often the only making such proof. If the deliver was due to the act the public enemy, or some inst which it might lawfully it was for the carrier to f within such exception. In ce of such proof, the plain- entitled to recover, and the is affirmed.' Nothing said rn Ry. Co. v. Prescott, 240 , 36 Sup. Ct. 469, 60 L. Ed. tes against this view. There id contract made by an ini- r with the shipper, limit- ability of the terminal car- warehouseman, and it was held that this contract was binding upon the shipper, and could be relied upon by the terminal carrier. Again, it was held that, as the terminal carrier's liability was as a warehouseman only, and that as the company was liable only for negligence and not as an insurer, the owner had the burden of proving negligence, especially where the loss was shown to have been due to fire. The following quotation gives the gist of that decision:

"'It was explicitly provided that, in case the property was not removed within the specified time, it should be kept, subject to liability "as warehouseman only." The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence. * * * In the present case it is undisputed that the loss was due to fire which destroyed the company's warehouse, with its contents, including the property in question. The fire occurred in the early morning, when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the railway company.'

"It will thus be seen that in this

case the court announced the general rule as to presumptions, but held that they did not apply for the reasons stated. We have expressly held that all plaintiff need do under the Carmack Amendment, where the action is against a terminal carrier, is to show good condition of the goods when delivered to the initial carrier, and bad or damaged condition when received by him from the terminal carrier. See Glassman v. Ry. Co., 166 Ia. 255, 147 N. W. 757; Carr v. Ry. Co., 173 Ia. 444, 155 N. W. 840. The same doctrine is announced in the following cases: Duvall v. R. R. Co. 135 La. 189, 65 South. 104; Eastover Co. v. Atlantic Coast Line Co., 99 S. C. 470, 83 S. E. 599; St. Louis Co. v. Mounts, 44 Okla. 359, 144 Pac. 1037; C., R. I. & P Ry. Co. v. Harrington, 44 Okla. 41, 143 Pac. 325; Collins v. Denver & R. G. Ry. Co., 181 Mo. App. 213, 167 S. W. 1178; Willett v. Ry. Co., 66 S. C. 477, 45 S. E. 93; St. Louis Ry. Co. v. Fenley (Tex. Civ. App.), 118 S. W. 845; K. C. So. Ry. Co. v. Carl, 91 Ark. 97, 121 S. W. 932, 134 Am. St. Rep. 56.

"I shall not take the time or space to quote from these cases. They each and every one hold that the Carmack Amendment does not change the rule as to what a plaintiff must prove in order to recover in an acttion for loss or damage to goods in interstate shipment against a terminal carrier. There are no decisions to the contrary which we have been able to find. St. Louis Ry. Co. v. Gould (Tex. Civ. App.), 165 S. W. 13, was an action against the initial carrier, and it was there held immaterial where the loss occurred, and the question here presented was in no manner involved.

"In Carlton Produce Co. v. Velasco Ry. Co. (Tex. Civ. App.), 131 S. W. 1187, the action was by an initial carrier against a connecting one to recover damages paid by it to a shipper. The action was bottomed upon the Carmack Amendment, and it was held incumbent on the initial carrier to show that the damage was done by the connecting carrier. It is said in that case that no presumption arose in favor of the initial carrier under the act, and that it was required to prove damages done to the goods while in the custody of the connecting carrier. It will be noticed that the action was under the Carmack Amendment, and that it was against a connecting and not a terminal carrier. Charleston Ry. Co. v. Varnville Co., 237 U. S. 597, 35 Sup. C. 715, 59 L. Ed. 1137, Ann. Cas. 1916I 333, was an action against a terminal carrier to recover damages to an interstate shipment of goods and for penalty imposed by a statute for failure to pay a claim promptly. The question presented was the validity of the state statute imposing the penalty and it was held that, as it imposed a penalty upon a terminal carrier for losses on roads in other jurisdictions, and increased its liability by a fine difficult to escape, it overlapped the federal act (Carmack Amendment) as respects the subject grounds and extent of liability and was therefore invalid. What was said with reference to presumptions had reference to this state of facts.

"It may be well, in closing, to call attention to the presumptions arising under the Carmack Amendment in actions by a shipper against an initial carrier, leaving aside actions against a connecting carrier. In an action against an initial carrier, the question as to where or on whose line the loss

l is entirely immaterial. All per need do, in the first in- n an action against the initial is to prove that loss or dam- urred at some time during t. In such cases there is no tion as to where the loss oc- for that is immaterial; but a tion does arise that, wherever age occurred, the initial car- esponsible, and the burden is to show that it is not liable, the damage was due to an od or public enemy, or that aused by the act of the ship- is agent. Or, if the action is d on the negligence of any carriers, as, for instance, as semen, the carrier must prove loss was due to some exempt s by fire. That being shown, urts hold that the burden is the shipper of showing neg- This is one kind of pre- n.

her, which in no manner con- th the previous one, is the tion which arises in an action a terminal carrier for loss or to goods, as to where or on ine the loss occurred. This the one involved in this case, ion to the further one, that as also an additional one like e first, which had to be met terminal carrier in the event not affirmatively prove that or damage occurred on some ne of road. Failure to dis- between these two kinds of tions is likely to cause diffi- We have to deal, then, with umption as to where the loss l, it being conceded that the c Amendment has not de- plaintiff of his cause of ac- ainst the terminal carrier. What is this presumption? Is it a rule of public policy or of state enactment, or is it a rule of evidence and of procedure which is in no manner mentioned in the Carmack Amendment? That it is the general rule applied by all courts, state as well as federal, unless changed by the Carmack Amendment, is conceded.

"This presumption is a rule of evidence founded on logic and human experience. In due course of business freight is safely handled and transmitted in good condition from one carrier to another until it reaches its final destination, and it is presumed that when this freight reached the hands of the delivering carrier it was in good condition. If it was not then the delivering carrier, having received the goods, has the better, and oftimes the only, knowledge as to the condition of the goods when received by it and their treatment thereafter. The rule is founded, as we have said, on logic, human experience, and of administrative necessity or convenience, and we see nothing whatever in the Carmack Amendment in conflict therewith. It does not conflict with any other presumption created or recognized by that amendment. As already observed, this amendment in no manner undertakes to say, by presumption or otherwise, where the loss actually occurred. In an action against the initial carrier, this is entirely immaterial. It becomes material under that act when, and only when, the initial carrier sues a connecting or terminal carrier for reimbursement, and, as this action is not of that kind, we need not consider the rule in such cases.

"There are no contrary and conflicting presumptions here, and it will

be presumed that the damage was done while the goods were in the possession of the terminal carrier. It is a rebuttal one, and if it shows that the damage occurred on another line, it is under no liability. There is, we may say, parenthetically, no presumption under the act that the actual damage occurred while the goods were in possession of the initial carrier. If the terminal carrier fails to show that the damage did not occur on its line, then it has another presumption or prima facie case to meet, and that is to show that the damage was due to some of the excepted perils, or was not of a kind for which it should be held liable under the original contract of shipment with the initial carrier. Until these presumptions are met, liability of the terminal carrier is shown, or at least a prima facie case is made out. There are no counter-presumptions, and the presumption does not conflict with any proved facts.

"Our conclusion is that the Carmack Amendment has not taken away from a shipper the right to sue a terminal or connecting carrier, and that his remedy is not alone against the initial carrier; that, in an action against a terminal carrier, the rules of practice, procedure, and evidence are not changed by the said Carmack Amendment; and that, while the case must be reversed on another ground, the trial court did not err in its conclusion that judgment should not be reversed for failure of proof.

"Reversed.

The liability of the terminal carrier for loss or injury to freight is the same as that of any other connecting carrier. If it has caused the loss, it is liable in a direct action. The final carrier to a through movement cannot object the initial carrier had no authority to issue the bill of lading. Where defendant steamship company issued a through bill of lading, and defendant railway company, the final carrier, accepted goods, the latter, when sued for delay in furnishing cars, cannot object that the initial carrier did not have authority to issue a through bill of lading. Gallop v. Norfolk So. R. R. (N. C. 1917), 91 S. E. 375.

In Cedar Rapids Fuel Co. v. I. C. R. Co. (Ia. 1916), 160 N. W. 353, the court said, p. 354:

"At the outset it is to be noticed that defendant was the terminal carrier, that the damages happened on the line of the initial carrier, and that defendant was in no manner responsible for the damages done the goods. In these circumstances there was no liability on the part of the terminal carrier. What is known as the 'Carmack Amendment' imposes liability for goods damaged or destroyed upon the initial carrier no matter where the loss occurs. Other carriers en route are not primarily liable unless the damage occurs on their line, and as no part of the damage occurred on defendant line of road, it is not responsible unless as contended by appellee, plaintiff herein, defendant company legally obligated itself to pay the damages. Kansas City Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Carter v. C., M. & St. P. Ry., 146 Iowa, 201, 125 N. W. 94; Elliot v. C., M. & St. P. Ry., 35 S. D. 57, 150 N. W. 777; Charleston Ry. Co. v. Varnville, 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333; C. N. O. & P. P. Co. v. Rankin, 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022; Georgia Ry. Co. v. Blish

., 241 U. S. 190, 36 Sup. Ct. Ed 948." Also see Collier v. . R. (Mo. 1916), 190 S. W. see H. & T. C. Ry. v. Rob- . 1917), 194 S. W. 218; hold the contrary, against : of authority.

inal carrier is not liable for at was caused by a preced- . Not infresuently a local nt of a delivering line may consignee to pay a claim r damage. This is done in an effort to simplify the of collecting claims, or to good will of the consignee, e other reason. While any that will simplify the col- claims is greatly to be de- very questionable whether f the kind referred to will that result. A local nt is not an executive of a He is a mere subordinate rtain amount of authority. scope of his agency he can ompany. Ordinarily, how- as no power to bind the o pay a loss occasioned by g company, for which his o way responsible. Indeed questionable whether any ld have such power. The f a claim for which a rail- t liable is the presentation nd, as such, strictly forbid- e act. Of course if the rier acknowledged the lia- as a party to some arrange- reby the terminal line could h a payment from the re- carrier, the payment might ut not otherwise. If, there- ilroad sees fit to repudiate of a local agent in agree- a claim, caused by a pre- rier, it has the right to do so and cannot be held liable under the terms made by such agent. So it has been held that a local freight agent of a terminal carrier has no authority to bind that carrier to become liable for a loss to a shipper which occurred on the line of the initial carrier in consideration of the consignee's salvaging the shipments for what he could get. The court said in Cedar Rapids Fuel Co. v. I. C. R. Co. (Ia. 1916) 160 N. W. 353, 355, 356:

"Moreover it must be remembered that defendant was under no legal obligation whatever to pay for the damages done the goods while in the possession of the initial or connecting carrier. Subject to his right of inspection, etc., plaintiff was bound to receive the goods. It did so as the consignee under the bill of lading issued by the initial carrier and could not at any time be heard to say that the damage done the goods amounted to a conversion thereof by any of the connecting carriers. The defendant's agent was therefore promising to pay plaintiff's damage for which defendant was not responsible, and that this was beyond the scope of his authority must be apparent. It is suggested in argument, however, that plaintiff was not obliged to take the goods, and that it did so only because of the agent's promise to make good the loss. Now, while plaintiff might not because of the nature of its contract with the consignor be required to accept the goods, as they were to be delivered to it f. o. b. Cedar Rapids, it did accept them as such consignee, as it had a right to do, and chose to rely upon the promise of an agent to pay damages for which his company was not liable, in such circumstances we think the promise was not only

beyond the scope of the agent's authority, but if given effect it would operate as a convenient cloak for the granting of rebates, thus perverting the very object of the Elkins Amendment (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. 1913 §§ 8597-8599]) to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379). That there was no conversion of the goods, see Parsons v. Express Co., 144 Iowa, 750, 123 N. W. 776, 25 L. R. A. (N. S.) 842; Clark v. Express Co., 130 Iowa, 254, 106 N. W. 642; Aultman v. Railway Co., 143 Iowa, 561, 121 N. W. 22. And as construing the Elkins Interstate Commerce Act, see U. P. Ry. Co. v. Goodridge, 149 U. S. 680, 12 Sup. Ct. 970, 37 L. Ed. 896. And as to authority of local agents in general, see Richmond v. Greeley, 38 Iowa, 666; Wolf v. Railroad Co., 93 Iowa, 218, 61 N. W. 847. C., M. & St. P. Ry. Co. v. Kelm, 121 Minn. 343, 141 N. W. 295, 44 L. R. A. (N. S.) 995, is clearly in point, and the principles there announced are governing here."

Without evidence locating the place of the damage to goods in transit over several connecting lines, and where it appears that the goods were delivered to the initial carrier in good condition, and were delivered by the terminal carrier in a damaged condition, a presumption arises that they were injured on the line of the terminal carrier, and the burden of proof is on it to show that the damage was not due on its line, and that it occurred without its fault or through the shipper's failure to perform his contract. United Brokers' Co. v. Southern Pac. Co. (Ore. 1917) 169 Pac. 114.

With practical uniformity courts recognize the rule that where freight, including live stock, is received by the initial carrier in good condition, and is delivered by the terminal carrier in a damaged condition, the presumption arises, the contrary not appearing, that such freight was delivered to such terminal carrier in the same condition as when received by the initial carrier; by reason of which presumption the burden is cast on such terminal carrier to show that the freight was not injured while in its possession. Wallingford v. Columbia Co., 26 S. C. 258, 2 S. E. 19; Shea v. Chicago, etc., Co., 66 Minn. 102, 68 N. W. 608; Texas, etc., Co. v. O'Laughlin, 37 Tex. Civ. App. 640, 84 S. W. 1104; Nashville, C. & St. L. Ry. Co. v. Johnson (Ind. 1915), 109 N. E. 912, 915, 916.

However, where the evidence discloses a proper handling and transportation while in a delivering carrier's possession, it plainly rebuts the presumption of negligence which ordinarily prevails against the delivering carrier when the shipment is shown to have been delivered the initial carrier in good condition and reaches the end of its journey a damaged state. G. H. & S. A. Co. v. Patterson (Tex. 1915) 173 W. 273, 274.

But the principle that the delivering carrier is presumed be responsible for damage caused livestock does not apply to a where the shipper accompanied the cattle and is in as good a position as the carrier to know the cause of injuries. San Antonio U. & G. Ry. Co. v. Storey (Tex. 1914) 172 S. W. 188.

And in an action for loss and damage the delivering carrier is liable only for the loss which it causes. Trakas v. Southern Ry. Co. (S. C. 1915) 186 S. E. 492.

rough the failure of the shipper to perform his contract.[85] same principles of evidence apply to damages occasioned by e delay in the delivery of shipments, although the carrier is

that passage is sold over a re- and connecting line does not such a relation between the is to render the terminal prima iable for any breach of contract y on the part of the receiving M. & W. P. Southern Ry. Co. es (Ala. 1915) 168 So. 987, 989.

it should be noted that a right ion against an intermediate or al connecting carrier, in an in- e shipment, for loss of property nsit resulting from its negli- is assignable; and where, as a of such loss, the property does ist, and where the bill of lading cing the same has been surren- to the carrier by the shipper in to obtain delivery to him of property embraced in such bill, signee may sue in his own name such right of action without ng that he is the actual holder h bill. St. L. & S. F. R. Co. v. s (Okla.), 144 Pac. 1036, 1037.

, a carrier may deliver goods to man in the habit of receiving for that particular consignee it does so is not guilty of mis- y. Kinston Cotton Mills v. At- Coast Line R. Co. (N. C. 1915), E. 633.

Central of Ga. Ry. Co. v. Chi- Varnish Co., 169 Ala. 287, 53 2; L. &. N. R. R. Co. v. Jones, la. 265, 14 South. 114; Central Ry. Co. v. Strickland, 4 Ala. 72, 58 So., 678, 7, 8.

land Valley Ry. Co. v. Hale, 6 84, 111 S. W. 646; St. L. I. M. . Co. v. Coolidge, 72 Ark. 112, W. 333, 67 L. R. A. 555; St. Louis I. M. & S. R. Co. v. Hudgins Produce Co. (Ark 1915) 177 S. W., 400, 401.

Where containers were suitable and proper goods were delivered by the initial carrier to the terminal carrier in good condition, and on arrival at destination the goods were damaged and the containers leaking, the terminal carrier was liable. United S. S. Co. v. Houston Packing Co. (Tex. 1915) 177 S. W. 570.

Where goods are delivered in good condition to the initial carrier, and are found damaged, due to negligence, when delivered by the terminal carrier, and it is not shown which carrier was negligent, the presumption is that the last one was negligent. Keithley v. Lusk (Mo. 1915) 177 S. W. 756.

By showing the delivery by a carrier to a shipper of a part of the original shipment, a presumption arises of its receipt by the carrier in the same condition as when delivered to the initial carrier, which imposes upon the carrier the burden of showing that missing goods were not lost while in its custody. Louisville & N. R. Co. v. Lynne (Ala. 1916) 71 So. 338, 339.

In an action against the terminal carrier for loss of goods, the burden is on the shipper to show that his goods were lost or diverted while in the carrier's custody. Louisville & N. R. Co. v. Lynne (Ala. 1916) 71 So. 338, 339.

Where a shipment was improperly handled by a terminal carrier and injury occurred while in its possession,

ɔt, as is contended, an insurer against delay in transporting, as is against the loss of the goods transported, except when such loss results from the act of God, the public enemy, or the fault ɔf the shipper. The carrier is only responsible, it is true, in case of delay when that delay was occasioned by its negligence and not when not so occasioned, but under the conditions as before stated, a presumption of negligence arises against the carrier also in cases of delay, and, if it (the carrier) would relieve itself of the presumption, it is incumbent upon it to prove that the delay resulted not from its negligence.[36] Under the rule that where goods are delivered to an initial carrier in good order and delivered by a terminal carrier in a damaged condition, a presumption arises that the shipment reached the terminal carrier in the same condition as when delivered to the initial carrier, and that the burden is upon the terminal carrier of meeting this presumption with evidence that the goods were not injured while in its possession, where a terminal carrier did adduce proof sufficient to overcome the presumption and showed that the damage was caused by delay occurring before the shipment was delivered to it, the presumption prevailed against the next preceding carrier and placed on it the burden of showing that the damage was not caused while in its hands.[37]

it was liable without reference to a provision in its bill of lading exempting it from liability for injuries not occurring over its own line. United S. S. Co. v. Houston Packing Co. (Tex. 1915) 177 S. W. 570.

In suit against a terminal carrier for loss of goods, testimony of a checking clerk that at the point of delivery to the carrier the car was found short the goods complained of; held insufficient to overcome a presumption that the missing goods came into the carrier's possession, where the clerk did not see the car opened. Louisville & N. R. Co. v. Lynne (Ala. 1916) 71 So. 338, 339.

36. 4 Ruling Case Law, 916, 917, Sec. 372; 6 Cyc. 442. L. & N. R. Co. v. Cheatwood (Ala. 1915) 68 So. 720, 722.

37. St. Louis, I. M. & S. Ry Co. v. Home Oil & Mfg. Co. (Ark. 1916) 183 S. W. 176; Eastover Mule & Horse Co. v. A. C. L. R. R. (S. C. 1914), 83 S. E. 599.

CHAPTER VI.

CIRCUMSTANCES RELIEVING CARRIER OF LIABILITY.

1. In General.
2. Fault of Shipper.
3. Inherent Character of Shipment.
4. Act of God.
5. Act of the Public Enemy.
 —Strikes.
6. Operation of Law.

1. **In General.** By far the greatest number of claims arise :cause of the negligence of the carrier during transportation. nce it is held to an extraordinary degree of care in practically l instances, it is obvious that what might legally be termed :gligence might not appear as such to the lay mind. The carrier :rforms transportation for hire. Being paid for this service, the w early read into the contract of transportation the extraordi- ıry liability of insurer. It was assumed the rate charged was gh enough to fully compensate the carrier for such damages as might be compelled to pay because of oversight or carelessness ı the part of anyone of its numerous employes. It was deemed ı the public interest to hold the carrier to such strict accounta- lity. If not, and the carrier could plead exemption because the ırelessness of an employe was unintentional, then there would ɜ no inducement to a carrier to be careful in its operation or cir- ımspect in its hiring of employes. Recognizing, however, that ɔ-matter how careful the carrier might be, there were certain ıuses of loss over which it had no control, the law exempted the ırrier from loss caused through anyone of five reasons. These ɾe an act of God, such as an earthquake, avalanche and the like; ı act of the public enemy, which means hostile troops, but not ɾikers; the fault of the shipper, such as defective loading of the oods, where the shipper loads; and the natural propensities of

live stock, in case of such shipments, which exempts from injuries caused through goring, fighting and the like; the last exemption might be termed exemption through special laws, and refers only to exemptions in the navigation laws, under which, in certain cases, a vessel can throw its cargo overboard without incurring any liability therefor. These are general rules, however, and exceedingly dangerous when applied by inexperienced or biased parties. Like all general rules, they have been very greatly modified by the decisions of the various courts. An exhaustive discussion is out of place here, but some slight explanation will be attempted. In analyzing cases in which the carrier claims an exemption it is desirable that the theory concerning the liability of the carrier be always kept in mind. Many courts have gone astray on this question. It is surprising how many courts, in holding the carrier liable for loss, assume that it is merely a case of negligence, that is, that the carrier is liable for loss because it is negligent. Around that fallacious theory has grown up those cases which are so vexatious to the traffic counsel, and mislead so many claim agents. A claim is presented against a carrier — the claim agent investigates and finds that the railroad acted with due diligence in transporting and can find no record of rough handling. Nevertheless, damage has occurred. He refers the case to the railroad's commerce counsel. The law is examined and those cases are found which appear to the place the liability on the carrier on the ground of negligence. No negligence appearing in this case, the claim is declined. Now the carrier may innocently have done an injustice to the shipper and refused a claim which was perfectly valid. The carrier is held liable *for* loss because it is paid a consideration to safely transport the shipment from origin to destination. The failure of the carrier to safely transport the goods is therefore the breach of a contract. Since, under our system of jurisprudence, claim for such loss or damage may be brought either as damages for breach of the contract or in what is called a tort action, that is, an action for a wrong done to the owner of the goods, it is presumed that since the goods were not safely carried the carrier committed the wrong by being negligent. It is seen therefore that the negligence of the carrier is not because the goods were damaged but the wrong is because the goods were not safely transported.

which is conclusively shown by the goods being damaged or lost. This wrong is not excused by the carrier showing it used care in the transportation, because it was early declared in the law that public policy demanded that the carrier be held to a strict performance of its contract for safe transportation. It is on this account that it was very early held that the carrier could not by contract exempt itself from liability for loss or damage caused by its negligence. Recognizing, however, the right of persons dealing on an equality to enter into such contract as they desired, it has come to be the rule that for a consideration the shipper and the carrier can agree that the liability for loss or damage, no matter how caused, may be limited to a certain amount. This phase of the law will be discussed more in detail under the Cummins Amendment, Chapter 8. It was also early recognized that there were certain causes which occasioned loss and over which the carrier had no control. It was considered unfair to hold it to liability in these cases and it is a brief discussion of these five excepted causes which we now come to. In this connection it must be noted that a common carrier has the burden of affirmatively pleading and proving any fact which will exonerate it from liability for refusing to receive and carry goods tendered to it for shipment.

2. **Fault of Shipper as Relieving From Liability.** It is the practice for shippers of carloads to load the freight. The carrier therefore has no supervision over packing and bracing of the shipment. Frequently the cars are delivered to the railroad already sealed. If the carrier has furnished a suitable car for the shipment it is the duty of the shipper to properly pack his shipments in loading the car. Any damage, therefore, which is occasioned through the defective loading or packing of the car is the fault of the shipper and the carrier is not liable for such damage. But, on the other hand, the carrier is liable in spite of defective loading if it furnished an improper car or handles the shipment roughly in transit or is guilty of any other act which contributes to the injury. One cause which relieves the carrier from liability for loss, providing it has been free from negligence, is the negligence of the shipper in loading and packing the goods. Even where the relationship of common carrier and shipper

½. Swayne & Hoyt v. Everett, 255 Fed. 71.

exists the carrier is not liable, where the loss is caused by the shipper's act, whether that act is one of negligence, misadventure, or misfortune.[1] So damage to a shipment of goods, due to its improper packing by the shipper, imposes no liability on the carrier, and where goods shipped were packed by the shipper in the car, the railroad was not liable for damage thereto, unless it occurred while the property was being unloaded by the road.[2] Evidence by the carrier that the capacity of ice bumpers in claimant's refrigerator cars was not sufficiently large to keep the meat cool enough to preserve it from decay, is admissible on the question of proper preparation by the shipper of the meat for shipment since if the shipment was not properly prepared to stand the transportation the carrier was not liable.[3] In an action for damages to a shipment of live stock resulting from the carrier's failure to unload it or to notify the shipper of its arrival so that he might unload it, held, that whether the shipper, in the exercise of ordinary care, should have been present to receive and unload it, was for the jury.[4] Where a shipper of live stock was negligent in failing to unload it on arrival so that it was injured, he could not recover for such injury.[5] If a shipper negligently loads the shipment so that injury results thereby, the carrier is not liable. It was the duty of a carrier of cattle to load them on the cars, but if the shipper's agent undertook to and did load them, and as a result of his negligence in overloading the car or rough handling the cattle were injured, the carrier was not liable for the resulting damage.[6] If a shipper's agent merely assisted the train crew in loading cattle under the control of the train conductor, and the car was negligently overloaded and the cattle

1. Model Mill Co. v. Carolina C. & O. Ry. Co. (Tenn. 1916), 188 S. W. 936. In this case the carrier was held not liable for deterioration in the quality of a shipment of flour, rejected by consignee at destination and which the shipper took no steps to preserve.

2. Greenwald v. N. Y. C. & H. R. R. Co., 159 N. Y. S. 15.

3. Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co. (Mo. 1916), 187 S. W. 149.

4. Chicago, R. I. & P. Ry. Co. v. Pavillard (Tex. 1916), 187 S. W. 998.

5. Chicago, R. I. & P. Ry. Co. v. Pavillard (Tex. 1916), 187 S. W. 998.

6. Massey v. Texas & P. Ry. Co. (Tex. 1918), 200 S. W. 408.

thereby injured, then the carrier was liable for the resulting damage, but not for any injury sustained by rough handling of the cattle by the shipper's agent while loading when not authorized by the conductor.[7] In an action for damages to a shipment of calves, defended on the ground that the shipper, through his agent, undertook to and did load the calves, and that over the carrier's protest the car was overloaded, and that the damage sustained was caused by negligence in overloading and rough handling by the agent, the burden was on the carrier to show that the agent undertook to load the cattle and roughly handled them in so doing.[8] If a caretaker accompanies the shipment however, the duty of looking after the goods then devolves upon him.[8½]

7. Massey v. Texas & P. Ry. Co. (Tex. 1918), 200 S. W. 408.

8. Massey v. Texas & P. Ry. Co. (Tex. 1918), 200 S. W. 408.

8½. Generally the shipper of live stock has a caretaker accompany the shipment, whose duty it is to look after it. On this account it has been held that the duty of properly caring for the stock in transit has been transferred from the carrier to the shipper. So where a shipper of live stock agrees to load and unload the same and to take care of them in transit and is carried free for that purpose, it is the duty of such shipper to see that the live stock receives sufficient ventilation and other care en route and the carrier is not liable if the stock suffers from lack of care. Hanner v. Fargo, 151 N. Y. S. 913. A common carrier is, at common law, an insurer of goods shipped, except for damages arising from certain excepted causes. One excepted cause is improper packing by the shipper. The rules applicable to contributory negligence do not apply to such a case. The carrier must, to relieve himself from liability, show that the fault the shipper was the sole cause of of the loss. Northwestern Marble & Tile Co. v. Williams (Minn. 1915), 151 N. W. 419. However, if improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the shipment, knowing it to be defectively packed, he assumes to carry the goods as they are, and the full common-law liability as carrier attaches. Northwestern Marble & Tile Co. v. Williams (Minn. 1915), 151 N. W. 419. Although the carrier has knowledge of defective packing, yet if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. On this point the evidence presents a question for the jury. Northwestern Marble & Tile Co. v. Williams (Minn. 1915), 151 N. W. 419. But the agreement

3. Inherent Character of Shipment as Relieving From Liability. This doctrine generally applies to shipments of perishable produce and live stock, although it may be invoked in any case where the inherent character of the goods shipped is such as to naturally cause a deterioration during transit. For instance, if perishable produce is shipped in poor condition, so that in spite of all necessary precautions and the usual scheduled transportation, the produce has decayed by the time it reaches destination, the carrier is not liable in a case of this kind. Very often grapes, for instance, have been damaged by a rainy season. They are packed carefully, shipped under proper refrigeration, but decay is due to natural causes and not to any breach of contract of the carrier. Under these conditions the carrier cannot be held responsible. On the other hand, it must be borne in mind that if negligence of the carrier also is shown, the carrier is, by the weight of authority, held responsible. So damages sustained through live stock being unruly, vicious, and ill tempered, are not such damages as the carrier is responsible for. On the other hand, if the carrier confines the stock in pens too small, or transports it under such conditions that its negligence contributes to the injury, then as in the case of shipments of perishable produce, it may be held responsible. While common carriers of property are insurers, in the absence of a contract limiting their liability, they are such insurers only in a qualified sense. Thus they are not insurers against injury resulting from the act of God or a public enemy, or from the inherent nature of the thing carried. Thus they are not insurers that fruit carried will not decay, or

that a shipper should care for animals in transit is no defense to an action for damages to the same, unless the railroad company shows adequate facilities were provided, and the agreement was reasonable. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916), 182 S. W. 361. And the negligence of the carrier should not contribute to the injury. Thus where the injury to a shipment of mules by rail was caused by the evil and vicious propensities of the animals, incited and caused to be exercised by the carrier's negligence in failing to sand the floor of the car, leaving it smooth and slippery, causing the mules to fall, kick, and bite one another, the road was liable for the resulting damage. Blair Horse and Mule Co. v. St. Joseph & G. I. Ry. Co. (Mo. 1915), 180 S. W. 412. Also see Zimmerman v. N. P. Ry. (Minn. 1918), 167 N. W. 546.

that liquids will not evaporate, or that animals carried will not inflict injuries on themselves or their fellows, through their natural disposition to be frightened, or to crowd, kick, hook, etc., nor, in the absence of negligence, are they liable for damages resulting therefrom. Subject to such limitations or exceptions, common carriers, in the absence of a contract as aforesaid, are insurers of the property carried by them.[9] In other words the obligation of

9. Swiney & Am. Co., 144 Iowa, 342, 115 N. W. 212, 122 N. W. 957; Mo. Pac. Co. v. Harris, 67 Tex. 166, 2 S. W. 574; Church v. Chicago, etc., Co., 81 Neb. 615, 116 N. W. 520; Coupland v. Housatonic Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; 5 Thompson on Negligence, sec. 6471; Cleveland, etc., Co. v. Schaefer, supra; Stiles v. Louisville, etc., Co., 18 L. R. A. (N. S.) 86, note. Nashville, C. & St. L. Ry. Co. v. Johnson (Ind. 1915), 109 N. E. 912, 916; C. R. I. & P. Ry. v. Scott (Tex. 1912), 156 S. W. 298. St. Louis Southwestern Ry. Co. of Texas v. Kerr (Tex. 1916), 184 S. W. 1058.

In Hutchinson on Carriers, 3rd Ed. p. 343, Sec. 336 the rule is laid down as follows:

"The liability of the common carrier of animals, it is said, is essentially different from that of the carrier of merchandise or of inanimate property. While common carriers are insurers of inanimate goods against all loss and damage except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care. In the transportation of live stock, in the absence of negligence, the carrier is relieved from such responsibility for such injuries as occur from or in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation, or they may die from heat or cold. In all cases, therefore, where injuries occur by reason of the inherent vices or natural propensities of the animals themselves, the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires."

To the same effect, see the following cases.

Texas etc., R. Co. v. Hunter, 47 Tex. Civ. App. 190.

M. P. Ry. Co. v. Harris, 67 Tex. 166.

Gulf etc., R. Co. v. Trawick, 68 Tex. 314.

M. P. R. R. Co. v. Fagan, 72 Tex. 127.

G. etc. R. Co. v. Baird, 75 Tex. 256.

Tex. etc. Ry. v. Hunter, 47 Tex. Civ. App. 190.

Ft. Wayne etc., R. Co. v. Nat'l Bank, 81 S. W. 1050; 98 Tex. 616.

I. & G. R. R. v. Young (Tex.) 72 S. W., 68.

Winslow v. C. & A. R. Co. (Mo. 1913), 157 S. W. 96.

Summerlin v. Seaboard Air Line Ry. (Fla. 1908), 47 So. 557.

Quinby v. Union Pac. R. Co. (Neb. 1909), 120 N. W. 453.

Webster v. U. P. R. Co. (Colo. 1912), 200 Fed. 597.

McCampbell, Figg & Burnett v. L. & N. R. Co. (Ky. 1912), 150 S. W. 987.

Foust v. Lee (Mo. 1909), 119 S. W. 505.

Harden v. C. & O. Ry. Co. (N. C. 1911) 72 S. E. 1042.

Adams Express Co. v. Scott (Va. 1912), 73 S. E. 450.

Green v. C. M. & St. P. Ry. Co. (Mo. 1910), 137 S. W. 611.

G. H. & S. Ry. Co. v. Jones (Tex. 1910), 123 S. W. 737.

St. L. & S. F. R. Co. v. Franklin (Tex. 1909), 123 S. W. 1150.

Weaver v. So. Ry. Co. (Ga. 1912), 75 S. E. 447.

So, where stock is received for shipment, it is only the duty of the carrier in shipping the same to furnish suitable and adequate accommodations.

M. Pac. R. R. v. Kingsbury, (Tex. Civ. App.), 25 S. W. 332.

For instance, if the shipper is satisfied with bedding which is furnished, no recovery can be had of the stock injure themselves by rubbbing themselves against the side of the car.

Tex. Cent. R. R. Co. v. O'Laughlin (Tex. Civ. App.) 72 S. W. 610.

Where the injury is due in whole or in part to the fault of the shipper, the carrier is not liable.

Tex. etc. R. v. Edins, 36 Tex. Civ. App. 639.

Tex. C. R. v. O'Laughlin, 72 S. W. 610.

Ft. Worth & D. C. Ry. Co. v. Wood, 32 S. W. 14 (Tex.)

But in all cases, the question as to whether the shipper is negligent is one for the jury.

M. P. Ry. Co. v. Edwards, 78 Tex. 307, 313.

Gulf etc. Ry. Co. v Taliaferro, 40 Tex. Civ. App. 388.

Where live stock is injured in transit by trampling, biting, or kicking each other, the carrier is not liable for such injury, the risk of which the shipper assumed. Schloss-Bear-Davis Co. v. Louisville & N. R. Co. (N. C. 1916), 88 S. E. 476.

Where the proximate cause of the death of a mare in transit was a kick from another horse while in the shipping pens, not brought about by any negligence of the railroad's servants, and not followed by any negligence of the road in the further transportation of the mare, proximately contributing to her death, the road was not liable therefor, since in shipments of live stock the carrier is not liable for injury arising only from the inherent nature or vicious disposition of the animal. Ft. Worth & D. C. Ry. Co. v. Ft. Worth Horse & Mule Co. (Tex. 1915), 180 S. W. 1170.

Where a mare was seriously injured either in the cars or by being kicked by another mare in the shipping pens, and the shipper's agent had knowledge of the fact, and knew, or might have known by the exercise of due care, the danger

·rier to deliver in good condition is limited by taking into
ɛration the perils of the road and the natural propensities
animals themselves, and if, considering these, it fails to
· them in the condition received, it is responsible for dam-
ınless these were occasioned by the neglect of the shipper
ıgent.[10] And the burden is upon the carrier to show that

ıer transporting such mare,
lined to unload her and to
:h reasonable precautions as
ıave resulted in her recov-
ing a chance on it, and the
transportation, unaccom-
by any negligence on the
the railroad's servants, re-
n the mare's death, the road
t liable. Ft. Worth & D.
Co. v. Ft. Worth Horse &
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71.

e the agent of the shipper
ıare, after discovering the
ɜ injured condition in the
rected that she be shipped
ugh and not removed from
n, which was negligence on
t proximately contributing
mare's death, the shipper
ıot recover therefor from
road, although its servants
so negligent in the further
rtation, since after the dis-
of an injury, even if wrong-
ccasioned, the duty rests
he owner of the injured
y to exercise reasonable
save it or lessen the injury.
rth & D. C. Ry. Co. v. Ft.
Horse & Mule Co. (Tex.
30 S. W. 1170, 1171.

not necessary for a carrier
ifically plead the defense of
rom the inherent propensi-
he animals, but proof there-
ld be admissible under its
general denial of the negligence charged against it, unless it could be said that the evidence showed some inherent vice in the particular cattle not common to cattle generally. St. Louis Southwestern Ry. Co. of Texas v. Kerr (Tex. 1916) 184 S. W. 1058.

10. Golsch v. Chicago, M. & St. P. Ry. Co. (Iowa 1915), 153 N. W. 327, 328.

A carrier of live stock is not an insurer, as in the case of inanimate freight, and may escape liability for injuries resulting from an act of God, public enemy, fault of the shipper, or the inherent vice of the animals. Botts v. St. Louis & H. Ry. Co. (Mo. 1915), 177 S. W. 746.

The carrier is not liable for injuries caused through the natural propensities of the animals, but this does not relieve it from liability for damage due to delay or the like. Michie on Carriers, page 1341, lays down the rule as follows:

Sec. 1848:

"That a carrier may avoid liability for injuries to horses during transportation on the ground of their vices and natural propensities, it must appear that the injuries occurred by reason of such vices and natural propensities alone, or in conjunction with some innocent cause, and the burden is upon the carrier to prove that fact. * * * Where the carrier carries the

the damage was due solely to inherent defects in the shipment. It would not be enough for the carrier to show that the damage was caused partly by the inherent quality of the article; for, if it was due only partly to the carrier's negligence, it would be liable. [11] So where under the evidence the injury to a shipment could have been caused by the negligence of the carrier or the inherent nature of the goods, a verdict of the jury that it was

animals without any negligence on its part, there can be no liability for injuries where the vicious propensities or inherent bad condition of animals give rise to the damage in transit, without any fault of the carrier, but where there is evidence to show that cattle were subjected to great delay, and not properly treated en route, and even those not mares suffered injury therefrom, the carrier cannot say that it is relieved from certain damages in respect to the mares because they were predisposed to injury from its negligence. Nor can it claim that the injuries to such mares were not such as should have been reasonably anticipated as the effect of negligent treatment."

Hutchinson on Carriers (3rd ed.) further explains the rule as follows: Sec. 342.

"But while it is always competent for the carrier to show in his defense that the injury resulted from the peculiar nature or inherent vices of the animals themselves and thus excuse himself from liability, if it appears that he has been guilty of any negligence and that such negligence contributed to the injury, the excuse can no longer avail him. It is his duty to exercise at all times ordinary care in guarding the stock against such injuries as are likely to result from their natural propensities and which, in view of the character of the animals, can reasonably be foreseen and provided against; and for a failure to do so whereby the animals cause themselves injury, he will be liable. Thus, in the case of Loeser v. The Railway, 94 Wis. 571 it appeared that the defendant's servants unloaded a number of horses from the car in which they were being transported and drove them in a group into a yard, where they were to be tied. Before all the horses were tied, two of the number began to kick and one of them, by its own act of kicking dislocated its leg at the hock, necessitating its being killed. The jury found that the manner of driving the horses loosely in a body instead of separately was, under the circumstances, a negligent act, and returned a verdict against the defendant. On appeal judgment on the verdict was affirmed, the court saying that ordinary care might well have required in such a case that vigilance be used to guard against and restrain the natural propensities of the animals to cause themselves injury."

11. Capital City Oil Co. v. Central of Georgia Ry. Co. (Ga. 1915), 86 S. E. 57, 59.

caused by the negligence of the carrier will not be disturbed.[12] Injury from inherent qualities is somewhat in the nature of damages resulting from the act of God; and in the more recent development of the rules as to liability of carriers it has been held that they are not liable for loss or damage due to the intrinsic qualities of the goods carried.[13] When the goods composing a shipment are of such intrinsic character as to be self-destructive, or incapable of safe transportation, the presumption that damage which accrues in the course of the transportation was due to the negligence of the carrier is rebutted by showing that the damage was due to the inherent qualities of the shipment. But, the burden in such a case would be upon the carrier to prove, by satisfactory evidence: (1) that the shipment had an inherent defect or vice which ultimately caused the loss or damage to it in transit; and (2) that negligence of the railway company, or its agents or employes, or of connecting carriers, did not contribute to such loss or damage.[14] So, where a shipment of cattle, suffering from Texas fever, is negligently delayed by the railroad, and the cattle are damaged solely on account of their infection with the disease, the shipper cannot recover for the damages so caused.[15]

4. **Act of God.** A carrier is not liable for loss or injury to goods caused by an act of God. An act of God is such an inevitable or unavoidable accident not attributable to human agency as produces injury to the goods. It must be one of those misfortunes which no skill or watchfulness on the part of the carrier could have foreseen. Many examples will at once suggest themselves to the reader. Floods, cyclones, earthquakes, and the like are generally regarded as furnishing an excepted cause. But even these will not excuse the carrier if they could have been foreseen by the carrier or if it had knowledge in time to protect the shipments. Prior to the time that the federal decisions controlled

12. Karr v. Baltimore & O. R. Co. (W. V. 1915), 86 S. E. 43.

13. Ohlen v. A. & W. P. R. R. Co., 2 Ga. App. 328, 58 S. E. 511. See, also, Forrester v. Georgia Railroad, etc., Co., 92 Ga. 699, 704, 19 S. E. 811.

14. Capital City Oil Co. v. Central of Georgia Ry. Co. (Ga. 1915), 86 S. E. 57, 58, 59.

15. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

in the determination of liability for loss and damage, there had been two lines of state decisions applicable to cases where goods were damaged through an act of God, such as a flood, avalanche, or the like, and where the goods would not have been at the spot where the injury occurred, but for some negligence on the part of the carrier. One line of reasoning held that if the negligence of the carrier contributed with the act of God in causing the loss the carrier was liable. Other decisions inclined to the view that the carrier was not liable unless it clearly appeared that the injury was due solely to the negligence of the carrier. Latterly the state courts seem to lean to the position that this question must be determined solely with a view to the holding of the federal courts, and that those courts hold that even though the negligence of the carrier commingles with the act of God, the carrier is not liable. So it has been held that where but for the negligent delay of a carrier, a shipment would have escaped the Ohio floods and been undamaged, although the carrier was liable under the decisions of Minnesota because its negligence contributed to the injury caused by the act of God, yet, since under the federal decisions the carrier is not liable for loss due to an act of God even though its own negligence, such as unreasonable delay, contributes to the injury, on an interstate shipment it will be held exempted from liability.[16] But a loss by fire, unless caused by

16. Northwestern Consol. Milling Co. v. C. B. & Q. R. Co. (Minn. 1917), 160 N. W. 1028.

Where the carrier shows that the property was destroyed by an act of God, if the shipper claims that negligence of the carrier contributed to the loss, the burden is upon the shipper to prove such negligence. Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co. (Minn. 1917) 160 N. W. 1028.

Under the rule applied in the federal courts, unless the carrier is chargeable with some negligence other than delay in making the shipment, the destruction of the property by an act of God, not foreseen in time to guard against it, absolves the carrier from liability. Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co. (Minn. 1917), 160 N. W. 1028.

In Milling Co. v. Chicago, B. & Q. R. Co. (Minn. 1917), 160 N. W. 1028, the court said, pp. 1029, 1030:

"The facts are not in dispute. The flour reached Columbus, Ohio, on March 19, 1913, and remained in the railroad yards at that place until March 25th, on which date it was destroyed by an unprecedented flood. That the flood was of an unprecedented character is not questioned. The liability of defendant is predicated upon the following find-

facts made by the trial court: through the unreasonable and concurrent negligence of defendant's agents and con- carriers the said flour was d destroyed by floods at Co-, Ohio, on March 25, 1913.' evidence is ample to sustain ling that the delay at Colum- s unnecessary and unreason- and, if the carrier is liable property destroyed by a would not have been in the if the flood except for the nt delay of the carrier, is entitled to recover. This following the rule adopted by state courts, held in Bibb Corn Co. v. A. T. & S. F. ., 94 Minn. 269, 102 N. W. L. R. A. 509, 110 Am. St. 51, 3 Ann. Cas. 450, in respect perty destroyed by a flood being transported by a com- arrier that if the carrier neg- y delayed the shipment, and ods were overtaken in tran- damaged by an act of God would not have caused the e had there been no delay, he e even though the act of God not reasonably have been an- d. Defendant contends that Hepburn act (Act June 29, . 3591, 34 Stat. 584) and the nents thereto Congress has as- exclusive control over inter- ommerce; that state laws no apply thereto; and that the courts have established the hat where goods are de- d by a flood or other act of he carrier is not liable there- ven if the goods would not been within the range of the ctive force except for the ent delay of the carrier. We find defendant's contention well founded. That Congress has now taken exclusive control of the subject of interstate commerce, and that such commerce is now governed by the laws enacted by Congress and by the 'common-law principles accepted and enforced by the federal courts,' to the exclusion of state laws and state rules and policies, is fully established. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Southern Express Co. v. Byers, 240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825; Atchison, T. & S. F. Ry. Co. v. Harold, 251 U. S. 371, 36 Sup. Ct. 665, 60 L. Ed. 1050; Ford v. C., R. I. & P. Ry. Co., 123 Minn. 87, 143 N. W. 249; N. Y. C. & H. R. Ry. Co. v Beaham, 242 U. S. 148, 37 Sup. Ct. 43, 61 L. Ed. —, filed December 4, 1916. Where property is destroyed by an act of God, but would not have been within the range of the destructive force except for the negligent delay of the carrier, is established as the rule accepted and enforced in the federal courts that the act of God, not the negligent delay of the carrier, is the proximate couse of the loss, and that the negligent delay of the carrier is too remote as a contributing cause to entail liability upon him. Clark v. Barnwell, 12 How. (53 U. S. 272, 13 L. Ed. 985; Memphis Ry. Co. v. Reeves, 10 Wall. (77 U. S.) 176, 19 L. Ed. 909; Western Transportation Co. v. Downer, 11 Wall. (78 U. S.) 129, 20 L. Ed. 160; St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; Thomas v. Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88; Cau v. Texas & P. Ry.

Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; New Orleans & N. E. Ry. Co. v. National Rice Mill Co., 234 U. S. 80, 34 Sup. Ct. 726, 58 L. Ed. 1223; Seaboard Air Line v. Mullin (Fla.) 70 South. 467.

"In Memphis Ry. Co. v. Reeves, supra, a case involving damage by flood, the court said:

"'The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and the defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff. In contrast with the stringent ruling here stated, and as expressive of our own view of the law on this point, we cite two decisions by courts of the first respectability in this country. In Morrison v. Davis, 20 Pa. 171 [57 Am. Dec. 6951], goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, "Causo proxima, non remota spectatur," applied as well to contracts of common carriers as to others. The court further held that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

"'In Denny v. R. R. Co., 13 Gray [Mass.] 481 [74 Am. Dec. 645], the defendants were guilty of negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson river. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of Morrison v. Davis, supra. Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case. As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if defendant had contracted to start with the tobacco the evening before, and the

believe if he had done so the would have escaped injury, the defendant was liable. Even :re had been such a contract, ailure to comply would have only the remote cause of the

nder the federal rule unless arrier is chargeable with some gence other than delay in mak- he shipment, the destruction e property by an act of God, foreseen in time to guard st it, absolves the carrier from ity. The finding of fact in the nt case is broad enough to im- egligence on the part of the :r other than delay. Conse- ly it is necessary to determine ner there is evidence tending ove negligence other than de- without which the property l not have been destroyed by ood. It is the rule, enforced pplied in all the cases above that the burden of proving other negligence rests upon laintiff, and that he cannot re- unless such negligence is es- hed by affirmative evidence.

the Reeves Case, from which ave already quoted, it is said: common carrier assumes all except those caused by the f God and the public enemy. of the instances always men- l by the elementary writers of by the act of God in the case ss by flood and storm. Now, it is shown that the damage ed from this cause immediate- is excused.

What is to make him liable this? No question of his neg- ce arises unless it is made by her party. It is not necessary m to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.'

"The evidence shows that about 7:30 o'clock on the morning of March 25, 1913, the representatives of the railroad in whose yards the flour was then standing first became apprehensive that the waters of the Scioto river might overflow the levee protecting that part of the city of Columbus in which such yards were located, and that the water broke through the levee about two hours later and destroyed the freight in the yards, including the flour in question. This is the only item of evidence which can be claimed to have any bearing upon the question as to whether the company, in the exercise of reasonable care, could have saved the flour from destruction by the flood. There is no evidence whatever that it was feasible or even possible to move the flour to a place of safety, or to protect it otherwise, after the danger ought to have been anticipated. The evidence wholly fails to sustain any charge of negligence other than delay, and the judgment must be and is reversed."

Under the Carmack Amendment where a bill of lading exempted the carrier from loss by act of God, and was issued on the lower of two rates approved and published, and the goods were delayed through the negligence of a connecting carrier, so that, when they arrived at

the destination, they could not be unloaded, due to a heavy rain, and were damaged by water at the time of the Dayton flood, the carrier was not liable, the proximate cause of the damage being the flood, and not the carrier's negligence. Cont. Paper Bag Co. v. M. C. R. Co. (Me. 1916), 90 Atl. 259, 260.

In Cont. Paper Bag Co. v. M. C. R. Co. (Me. 1916), 90 Atl. 259, the court said, p. 261:

"Upon the issue before us in this case, the courts of the great majority of the states of the Union held the carrier liable. The courts of Massachusetts, Ohio and Pennsylvania have concluded otherwise. In Morrison v. Davis (1852), 20 Pa. 171, 57 Am. Dec. 695, goods under transportation on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse, used by defendant, delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held the flood to be the proximate cause of the disaster and the delay the remote cause, and that the maxim, 'Causa proxima, non remota spectatur,' applied as well to contracts of common carriers as to others. This was followed by Denny v. N. Y. C. R. R. Co. (1859), 13 Gray, 481, 74 Am. Dec. 645, in which Morrison v. Davis, supra, was approved and followed. The question was before the Supreme Court of the United States in 1869, and that court, after quoting the two cases last cited, said:

" 'Of the soundness of this principle we are entirely convinced.' Railroad v. Reeves (1869), 10 Wall 176, 191.

"The same principle is recognized in Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 270, and by St. Louis, etc., Ry. Co. v. Commercial Ins. Co., 139 U. S. 233, 237, 11 Sup. Ct. 554, 35 L. Ed. 154. And there are many decisions of the other federal courts to the same effect; and among them may be cited Empire State Cattle Co. v. Railway Co., 145 Fed. 457, 77 C. C. A. 601, affirming 135 Fed. 135; Thomas v. Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88.

"It should not be overlooked that the prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading, and that the principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents. A. T. S. F. Ry. Co. v. Harold, 251 U. S. 371, 378, 36 Sup. 665, 60 L. Ed. 1050. In view of these decisions, the court is of the opinion that had this case been submitted to a jury the trial court would have been justified, upon the evidence, in directing a verdict for defendant."

Where it was clear that the shipment was received by defendant on June 5th, although there was evidence that it was not received until June 6th, and the flood causing the delay occurred on June 6th, an instruction that if defendant received the shipment after it was in possession of facts which would put it upon notice of injury with reference to conditions of its bridges and tracks, the jury should find for plaintiff should not have given.

lightning, does not come within the exception of the act of God, and is chargeable against a common carrier.[17] Where a common carrier of goods was negligent in constructing its warehouse, and negligently failed to remove goods therefrom, though able to do so before an unusual wind and rainstorm blew down the warehouse, the negligence of the carrier renders it liable, even though the storm be considered an act of God.[18] An act of God is the manifestation of a superhuman power which breaks the chain of causation in the realm of human activity.[19] The Carmack

Worth & D. C. Ry. Co. v. Atterberry (Tex. 1916), 190 S. W. 1133.

17. American Express Co. v. Duncan (Tex. 1917), 193 S. W. 411.

18. Harris v. Norfolk So. Ry. Co. (N. C. 1917), 91 S. E. 710.

19. Chicago & E. Ry. Co. v. Schaff Bros. (Ind. 1917), 117 N. E. 869.

A wind and rain storm of such unusual extent and violence as to be out of the ordinary range of human experience is an "act of God" within the meaning of the principle which ordinarily relieves a common carrier from liability for loss or destruction of goods in such cases. Harris v. Mo. So. R. R. (N. C. 1917), 91 S. E. 710.

It is elementary that a common carrier is bound to use extraordinary diligence, and that, in case of loss, the law is against him and no excuse avails unless it was occasioned by the act of God or the public enemy of the state. It is equally well settled that for a carrier to avail himself of the defense that loss or damage was caused by the act of God he must establish not only that the act of God occasioned the loss, but also that his negligence did not contribute to it. Capital City Oil Co. v. Central of Georgia Ry. Co. (Ga. 1915), 86 17 S. E. 57, 58.

So, where a carrier is sued for loss or destruction of goods in transit, resulting from unreasonable delay in delivery, the defense that the delay was caused by an unprecedented flood, or some other act of God, will not avail where it appears that the delay was attributable not merely to this cause, but largely to the negligence of the carrier. Lamb v. W. H. Mitchell & Co. (Ga. 1915), 84 S. E. 213.

In a strong case recently decided, it appeared, in action for the destruction of household goods by a flood, while the flood referred to was perhaps the greatest that had occurred in more than a quarter of a century, it was not the greatest in the history of the stream, because there was testimony to show that a greater flood occurred about the year 1852. Held, that the jury was justified in finding that the flood in question was not such an unprecedented and extraordinary flood as the carrier was not required to anticipate and guard against. International G. N. Ry. Co. v. Penney (Tex. 1915), 178 S. W. 970, 971.

So, in an action for damages to a shipment destroyed by a flood, it is

Amendment, making the carrier liable to the shipper of interstate freight for loss or injury caused by it and prohibiting relief by contract from such liability, does not change the common-law rule as to effect of an act of God in excusing the carrier from loss

competent to prove that the flood was a matter of common knowledge and that all the persons in the vicinity knew, from telephone messages, reports in daily papers and telegrams, that the flood was approaching, in order to refute the contention of the railroad that it was unexpected and an act of God. International & G. N. Ry. Co. v. Penney (Tex. 1915), 178 S. W. 970, 971.

And hearsay evidence is admissible to show the history of a stream, in order to prove that a flood which had destroyed certain shipments was not unprecedented. International G. N. Ry. Co. v. Penney (Tex. 1915), 178 S. W. 970, 971.

In a typical case it appeared that an unusual freshet, continuing for some days, caused by the heavy rains within the watershed, raised the water of the Hudson river to an unprecedented height. The "peak" of the flood was between noon and 1 o'clock in the afternoon of the 28th of March, at which time the water was about five feet higher than the highest previous record. At Troy, prior to 1 o'clock on the 27th, the water raised one-tenth of a foot in an hour, and it fell with the same degree of fall. At this rate of advancement, 24 hours prior to noon on the 28th the water must have been about 2 2-5 feet lower than it was at the peak, which would make the flood at noon on the 27th about 2 3-5 feet higher than any previous flood. A car shipment for the injury of which suit was brought left Rensselaer at 10:27 a. m. on the 27th and arrived at Troy about noon of that day. The carrier placed the car in immediate proximity to a car of unslaked lime, when it knew that the water was higher than it ever had been known to be before and was still rising. It therefore owed the shipper an active duty to use reasonable care not to expose his property unnecessarily. It knew, or was chargeable with knowledge, that if water reached the unslaked lime a fire would naturally result. It knew, or should have known, the contents of the car containing the lime. It is true that the unusual height of the water caused the car containing the lime to burn, but if the car containing the claimant's goods had been properly placed the burning of the car would have caused him no injury. The loss, as a proximate cause, was due to the fact that the carrier negligently placed the goods next to the car of lime. The question for the jury was whether, under all the circumstances, the placing of the car was a negligent act on the part of the carrier, which was the proximate cause of the loss. Barnett v. N. Y. C. & H. R. R. Co., 153 N. Y. S. 374, 376.

And a strike, accompanied by violence and intimidation, may be treated as "an act of God," so far as it may cause delay on the part of a carrier in transporting goods. Southern Cotton Oil Co. v. L. & N. R. Co. (Ga. 1915), 84 S. E. 198, 199.

resulting proximately therefrom.[20] Whether there are circumstances which, as a matter of law, can charge a carrier with liability for injury to a shipment caused by an act of God is a question which must be determined by the federal decisions. The state courts seem to be pretty well satisfied that even if a carrier is negligent, still if the injury is occasioned by an act of God, the carrier cannot be held liable at all. Claimant shipped goods from New York to Maine and while in transit the carrier switched them near to a car containing unslaked lime. The water in the Hudson River rose to an unprecedented height, flooding the yard and causing the car containing the lime to be set on fire, which spread to the car containing the claimant's goods, and they were destroyed. The court said:[21] "In both the state and the United

A carrier of live stock is not liable for injuries caused by changing weather conditions. Southern Cotton Oil Co. v. L. & N. R. Co. (Ga. 1915), 84 S. E. 198, 199.

But if the negligence of the carrier concurs with the act of God in producing the injury, it is still required to answer therefor. Washington Horse Exchange v. Louisville & N. R. Co. (N. C. 1916), 87 S. E. 941.

So, where goods are lost or injured as a result of the negligent act of the carrier to whom they have been delivered for transportation, concurring with an act of God, the carrier cannot maintain that the act of God was the sole proximate cause of the loss of or injury to the goods, so as to relieve it from liability. St. Louis, I. M. & S. R. Co. v. Hudgins Produce Co. (Ark. 1915), 177 S. W. 400, 401; Vail v. Railway Co., 63 Mo. 230; 6 Cyc. 381; White v. Railway Co., 111 Minn. 167, 126 N. W. 533.

And negligence of the shipper concurring with an act of God in the destruction of goods delivered to a carrier for transportation constitutes no defense by the carrier to an action brought against it by the shipper for damages for the loss of the goods, where the carrier is also guilty of negligence which, occurring with the act of God, resulted in the loss of the goods. Gulf Coast Transp. Co. v. Howell (Fla. 1915), 70 So. 567.

20. Barnet v. N. Y. C. & H. R. R. Co. (N. Y. 1918), 118 N. E. 625.

21. Barnet v. N. Y. C. & H. R. R. Co. (N. Y. 1918), 118 N. E. 625.

Where claimant shipped a piano to a point 163 miles distant and 15 days later, while standing in way yards, it was damaged by the Dayton flood, the proximate cause was the act of God, and not the delay, and the carrier was not liable. Chicago & E. Ry. Co. v. Schaff Bros. (Ind. 1917), 117 N. E. 869.

In case of loss of an interstate shipment caused by an unprecedented flood, an act of God, reaching and setting fire to a car of lime near by, the finding, necessary for liability of the carrier, of negligence of carrier directly contributing to the loss, is not warranted;

States courts where proof is given that goods are damaged in the hands of the carrier, the burden is upon him to show that the damage arose from some cause for which he was not liable. They differ, however, in this: In the United States courts where the carrier shows that the loss was occasioned by the act of God he has done all that is required. If the shipper then claims that the carrier's negligence also directly contributed to the injury, he must show that fact. In New York, on the other hand, the burden is upon the carrier to show both the act of God and his own freedom from contributing negligence. Michaels v. N. Y. C. R. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426. That is the only distinction. Both jurisdictions hold that the act of God to relieve the carrier must be the immediate, direct, and efficient cause of the loss. Neither excuse him if his own negligence also directly and proximately contributes to the result. They may have differed as to when negligence did so directly contribute, as in the case of delays. Not as to the rule, only as to its application. Condict v. Grand Trunk Ry. Co., 54 N. Y. 500; Cormack v. N. Y., N. H. & H. R. R. Co., 196 N. Y. 442, 90 N. E. 56, 24 L. R. A. (N. S.) 1209, 17 Ann. Cas. 949; St. Louis, I. M. & So. Ry. Co. v. Commcl. Un. Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; R. R. Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909. As to the question of proximate cause, when we have to do with interstate shipments we must follow the United States courts. If, however, the rule as to the burden of proof is simply a rule as to procedure and evidence we should be guided by our own precedents. For some purposes it has been so held by us. Sackheim v. Pigueron, 215 N. Y. 62, 109 N. E. 109. But in determining the boundary between the state and federal jurisdiction the Supreme Court has held it to be a rule of substance. Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Central Vt. Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. We are bound by the federal decisions, as the shipment was interstate. The case was tried upon this theory. The jury was

there being no evidence that it knew, or should have known, when it placed the shipment near the car of lime, or in time to have permitted its removal, was in danger. Barnet v. N. Y. C. & H. R. R. Co. (N. Y. 1918), 118 N. E. 625.

charged that the burden was on the plaintiff to establish the defendant's negligence. This was right. The judgment must, therefore, be reversed, unless there is affirmative evidence on which the jury might base a finding of negligence which directly contributed to the loss, for concededly it was caused by an extraordinary flood, and such a flood is an act of God. The plaintiffs charge negligence in that the car was left in close proximity to a car of lime in a locality that the defendant knew was likely to be submerged. During the trial it was also claimed that the defendant left the car on the track longer than it should have done, and that it was, therefore, caught in the flood, and also substantially that the defendant should have anticipated the conditions in time to have removed the car from danger. Apparently these three questions were what the trial judge intended to leave to the jury. The difficulty is that there is no sufficient evidence to justify a finding by the jury in favor of the plaintiffs upon any one of them. Remembering that this was an interstate shipment, remembering also, the decisions of the United States courts on that subject, we must hold that any alleged delay on the part of the defendant, or any action on its part in placing the car near the car of lime, even were there evidence of negligence with regard to such a delay, or with regard to placing the car, was not the proximate cause of the loss. Nor is there any evidence that the defendant knew or should have known that the car was in danger at the time it placed it in the yard or in time to have permitted its removal. The flood was unprecedented, as has been said, and no such warning was given, so far as appears, and no such physical conditions existed as to allow a jury to impute this knowledge." At common law a carrier is not responsible for loss of goods due to an act of od, such as an unprecedented flood causing a river to overflow its banks and cover the tracks in a railroad freight yard.[22] An unprecedented flood overflowing a railroad yard was within a provision of a bill of lading exempting

22. Intl. Paper Co. v. N. Y. C. R. Co., 166 N. Y., S. 751.

At comon law, the burden is on the carrier to show that a loss or damage to goods shipped comes within one of the required exceptions to liability. Cudahy Packing Co. v. A. T. & S. F. Ry. (Mo. 1916) 187 S. W. 149.

So the carrier has the burden of proof on its defense that damage to freight was caused by an unprece-

the railroad from liability for any loss or damage caused by the "act of God." [23] To be a defense to an action against a carrier for the destruction of goods under a bill of lading excepting liability for damage from an act of God, the damages suffered must have been proximately, directly, and exclusively due to natural causes which could not have been prevented by any amount of foresight and care reasonably to be expected, and without human intervention. [24] Previous to the assumption by Congress of complete jurisdiction over loss and damage claims, it had been held that where destruction of goods was not due exclusively to natural causes, and where the carrier's negligence actively co-operated with the operation of the natural causes, the injury was not, in a legal sense, an act of God, so that where the destruction of goods by an unprecedented flood might have been avoided by human prudence and foresight reasonably to be expected from the carrier, but not exercised by it, it would be liable.[25] Until the

dented flood. St. L. S. W. Ry. of Tex. v. Hughston Grain Co. (Tex. 1916), 186 S. W. 429.

23. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

24. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

25. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

In an action against a railroad for the destruction of a car of screens by fire communicated to the car from a car of unslaked lime which had been set afire by flood or freshet overflowing a railroad freight yard, a rule of the American Railroad Association and a regulation of the Interstate Commerce Commission providing that cars containing unslaked lime must be protected from water when practicable, which had been brought to the knowledge of defendant's agent and yardmaster, was material and admissible. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

In an action against a carrier for the destruction of a car of screens from fire communicated from a car of unslaked lime fired by an unprecedented flood in a railroad yard, the predictions made by the weather forecaster, the knowledge of the carrier's freight agent and yardmaster as to previous floods, the conditions as they saw them on the day before, the public means for ascertaining probabilities as to flood conditions in that vicinity, and whether resort thereto would reasonably be expected, were matters to be considered on the question of the carrier's proximate negligence. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

In an action for the destruction

Supreme Court of the United States definitely passes upon the question (which it has not as yet), it cannot be said to be the rule in the federal courts, nor the federal law, that a carrier is not liable for an injury where its negligence commingles with that of an act of God in causing it. To sanction such a doctrine would in many cases work an unjust hardship upon shippers and reward the carrier for its own negligence. If a shipment of perishable produce is unreasonably delayed so that it becomes deteriorated, can the carrier be relieved from liability if it allows this shipment to remain in the path of a flood so that the injury becomes complete? But, if it is argued that it should only be liable for such part of the injury as was sustained before the shipment met the flood, how is the amount of such injury to be ascertained? It cannot be said that such instances are too far fetched. The books are full of cases where the negligence of the carrier actively commingled with an act of God in causing a loss. Almost uniformly has the carrier been held responsible under

of a car of screens by fire from a car of unslaked lime fired in a railroad yard, by a unprecedented flood, testimony of the weather forecaster as to the custom of the Weather Bureau as to giving publicity to its forecasts by daily weather maps mailed to public places, or by information telephoned to newspapers and to business houses, afforded no reasonable inference as the carrier's negligence in not protecting the property, and its admission was harmful error, especially in view of the carrier's custom of telephoning to the Weather Bureau for information as to flood probabilities. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

There was no error in the failure to charge that, in determining whether the carrier acted prudently in respect to the safety of the goods, a jury should consider its responsibility to its other patrons who had property in its yards was proper, where it was not applicable to the evidence. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

On evidence in such action, *held*, that it was for the jury to say whether it was negligence to place the car on a track near a car loaded with unslaked lime when a flood was probable, and whether it should not have been moved to some safer place in the yard while the height of the flood was such that it could be done. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917) 102 Atl. 44.

The court's refusal to charge that the burden was on the plaintiff to show that the carrier's negligence mingled with the act of God as a proximate cause of the destruction was not erroneous, where the court had fully charged on that matter. Porter Screen Mfg. Co. v. Central

such circumstances. That this is just is evident because it is in line with the policy of the law holding the carrier to a strict liability as insurer. To relieve against such liability means to open a pathway to interminable wrangling and argument and is a direct invitation to carelessness in railroad operation. A striking illustration is afforded by a very recent case. Here a valuable car of screens was destroyed, through fire communicated to it from a car of unslacked lime, which had been set afire by a freshet overflowing a railroad freight yard. It appeared that there was a rule of the American Railway Association, and a regulation of the Interstate Commerce Commission, providing that cars containing unslacked lime must be protected from water when practicable. In discussing the liability of the carrier, the court gave an excellent exposition of the law, which we submit will ultimately be held to be the rule by the federal courts. In Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917) 102 Atl. 44, the court said, p. 48: "In order to be a defense to the action,

Vermont Ry. Co. (Vt. 1917), 102 Atl. 44.

Such rule and regulation was notice to the carrier, its agents and servants in charge of freight traffic that if a car loaded with unslaked lime was entered by water it might take fire, though the accompanying running slip described the contents as "lime," without specifying whether it was slaked or unslaked. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917) 102 Atl. 44.

In an action against a carrier for damages caused by the freezing of a shipment of a bottled beverage, where it appeared that the consignor received a carload of the beverage, and that he took from the car a number of barrels containing the beverage and delivered them to defendant for shipment to plaintiff, an instruction was warranted that, if the shipment was damaged while being transferred by plaintiff or its agent from one car to another, defendant would not be responsible, as the jury was authorized to consider the consignor as plaintiff's agent for the purpose of transhipping the goods. Michellod v. Ore.-Wash. R. & Nav. Co. (Ore. 1917) 168 Pac. 620.

That the negligence of a carrier concurred in causing the loss of goods may import liability, though an act of God be also a contributory cause. Tuthill v. N. & S. R. Co. (N. C. 1917) 93 S. E. 446.

Where there was evidence that the shipper of live stock was required under his contract to bed the stock and care for them en route, an instruction that if plaintiff was negligent in failing to inspect the cars or negligently failed to care for his cattle during transportation, and that such negligence was the proximate cause of the damage, plaintiff could not recover, was not sufficient to present the issue

as an act of God, the damages suffered by the plaintiff must have been 'proximately due, directly and exclusively, to natural causes without human intervention, which could not have been prevented by any amount of foresight, pains, and care, reasonably to be expected.' Eagan v. Central Vermont Ry. Co. 81 Vt. 141, 69 Atl. 732, 16 L. R. A. (N. S.) 928, 130 Am. St. Rep. 1031. But if the damages were not due exclusively to such natural causes, in other words, if the negligence of the carrier, as an active and co-operative cause, mingled with the operation of the natural causes, the injury was not, in a legal sense, the act of God. So if the injury where the flood occasioned might have been avoided or prevented by human prudence, foresight, pains, and care, reasonably to be expected from the carrier, but not exercised by it, the defendant is responsible. Nugent v. Smith, 1 C. P. D. 423, 1 Eng. Rul. Cas. 218; Smith v. Western Railway, 91 Ala. 455, 8

T. & P. Ry. Co. v. Thorp (Tex. 1917) 198 S. W. 335.

Where, in an action for the loss of goods while in a carrier's warehouse, it offered evidence tending to show that the goods and warehouse were destroyed by a storm of such unusual violence and proportions as to amount to an act of God, relieving it from liability, and there was nothing to controvert this testimony, a verdict for plaintiff was properly set aside. Tuthill v. N. & S. R. Co. (N. C. 1917) 93 S. E. 446.

In such action, parts of an article in a daily newspaper published in a nearby city to the effect that the river would rise nearly 16 feet, stating its height there, and that it would continue to rise, and stating the weather observer's forecast and the basis thereof, was inadmissable to show what information was available to the defendant carrier as bearing on the question whether it ought to have known or to have inquired as to flood conditions in order to have protected the property, without a showing that the article had been seen and read by some of the carrier's agents. Porter Screen Mfg. Co. v. Central Vermont Ry. Co. (Vt. 1917) 102 Atl. 44.

In an action for the destruction of a carload of paper by an unprecedented flood causing a river to rise and cover the tracks in defendant's yard, evidence that a government weather observer had issued a flood warning for a rise which would not have endangered the cars, and that he had issued a notice of a higher rise without a showing of the facts on which the prediction was made or that it was brought to the knowledge of defendant or its employes, was inadmissible to show defendant's negligenve. Intl. Paper Co. v. N. Y. C. R. Co. 166 N. Y. S. 751.

A carrier of goods is liable for their loss or damage only where its own negligence contributes as a proximate cause to their destruction by an act of God, such as an unprecedented flood. Intl. Paper Co., N. Y. C. R. Co. 166 N. Y. S. 751.

South. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Michaels v. New York Cent. R. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Wolf v. American Express Co., 43 Mo. 421, 97 Am. Dec. 406; Baltimore & O. R. Co. v. Keedy, 75 Md. 320, 23 Atl. 643; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; Hecht v. Boston Wharf Co., 220 Mass. 397, 107 N. E. 990, L. R. A. 1915D, 725, Ann. Cas. 1917A, 445; 4 R. C. L. 719. In Davis v. Central Vermont R. R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852, it was found that the loss by fire of the grain while in the elevator of the defendant occurred without its negligence; but that, if the defendant had acted upon the orders of the plaintiff and removed the grain from the elevator as soon as the trial court found it should have done, the grain would have been removed before the fire. This court said the proximate cause of the loss was the fire, and the delay in moving the grain the remote cause, and consequently the defendant was not responsible. In discussing the question, however, the court stated that if the defendant could have protected the property from fire, after it knew the fire existed, by the exercise of reasonable prudence and diligence, and did not, it would have been liable for its failure to use this measure of prudence and diligence to protect the property, thus recognizing the rule laid down above." [26] A carrier is not liable for injuries caused through an act of God, such as a flood, but even in this kind of a case the carrier must use reasonable care to protect the shipment. In Chicago & E. I. R. Co. v. Collins Produce Co., 235 Fed., 857, the court said, p. 862: "Even though the rainfall was so extraordinary as to constitute 'an act of God,' the carrier was not relieved from all liability to the shipper. It still owed the shipper the duty of exercising reasonable diligence in endeavoring to save the shipment or prevent further loss. McNeil Higgins Co. v. Old Dominion Steamship Co., 235 Fed. 854, decided by this court at this session. The burden of proving that the loss resulted from some cause for which the carrier was not responsible in law or by contract is upon the defendant. Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace, 223 U. S. 481, 492, 32 Sup. Ct. 205, 56 L. Ed. 516. It became therefore incumbent upon the defendant to show that the loss was due solely to some one or more of the causes which by law exempted it from liability. If the loss be

oned by a commingling of the 'act of God' and the negli- of the carrier, the latter is not relieved from liability. Wolf ierican Express Co., 43 Mo. 421, 97 Am. Dec. 406; Wald v. urgh, C., C. & St. L. R. R., 162 Ill. 545, 44 N. E. 888, 35 L. 356, 53 Am. St. Rep. 332." But where a shipment is caught ood of so unusual a character as to constitute an act of God, rrier is not relieved of all liability, but is bound to exercise iable diligence to save the shipment or prevent additional r Where a car load of interstate freight in defendant car- charge as warehouseman would not be wet unless the water ver 21 feet above mean sea level and the extreme previous led height of water, and the only one above 20 feet was 21) feet in 1857, which was equally well known to plaintiff and lant, it was so highly improbable that water would enter r that no negligence can be charged against defendant prior : morning of the day of the loss when the United States ier Bureau predicted that the water would reach 20 to 21 nd it became apparent to all parties that there would be usual flood.[28] Where in the course of transportation goods jured by an unprecedented flood and there is no negligence : part of the common carrier in taking care of the goods or vise, the loss is attributable to the flood as an "act of God," ie carrier is not liable. Whether a common carrier is liable jury to goods, where, after being negligently delayed in t, the goods, while still in transit, are injured by an act of such as an unprecedented flood, depends upon whether the

Chicago & E. I. R. R. Co. v. Prod. Co., 235 Fed. 857.

Chalmers v. N. Y. Cent. R. Co., Y. S. 577.

1 action against a carrier for tion by flood of interstate in its charge as warehouse- here it was not shown that de- , after a prediction of flood in rning, had reason to anticipate : conditions of the service of a l having the right of way its yards would be such as to it necessary to preclude defen- dant from crossing its tracks during the afternoon, evidence held insuffi- cient to justify a finding that de- fendant was negligent. Chalmers v. N. Y. Cent. R. Co., 161 N. Y. S. 577.

A ship is not relieved from liability for damage to cargo on the ground of perils of the sea, where the cargo was accepted with full knowledge of its character, the manner in which it was packed, and the storms encoun- tered were no more severe than were reasonably to be expected, in view of the voyage and the season. The Er- skine M. Phelps, 231 Fed. 767.

negligent delay of the carrier has a proximate casual relation or a mere remote or casual relation to the subsequent injury. A merely negligent delay in transportation of goods, which delay causes the goods to be at a point in transit where they are injured or destroyed by an unprecedented flood that could not have been foreseen at the time of the delay does not render the carrier liable for the direct consequences of the flood upon the goods, if there be no malconduct by the carrier, and negligence of the carrier in providing reasonably safe and adequate facilities for and attention to the safety of the goods does not directly contribute to the injury, even though the goods would not have been at the point where they were injured, and would have escaped the flood but for the negligent delay of the carrier at a time when the flood could not have been foreseen. Such an injury is not an ordinary natural sequence of the delay. A "proximate cause" stands next in causal relation to the effect. It produces the result in continuous sequence, and is one without which the result would not have occurred.[29]

5. **Act of the Public Enemy.** While a loss suffered because of such an agency excuses the carrier, an excuse of this kind very rarely arises. What is meant by public enemy is an enemy of the country to which the carrier belongs. Thieves, robbers, rioters, strikers, and unruly soldiers are not deemed public enemies, and damages caused through the act of any such persons is not under this class.

Strikers. It seems to be inferentially held in the federal courts that a clause in a bill of lading relieving from liability in case of strikes, is valid.[30]

29. Seaboard Air Line Ry. v. Mullin (Fla. 1915) 70 So. 467. This was an action brought for injuries caused in the Ohio flood and therefore the negligence of the carrier in delaying the shipment having a merely casual relation and not a causal relation to the act of God and the injury the claimant cannot recover.

30. Error, if any, in the ruling of the trial court in an action against a carrier for damages caused by delay in transporting an interstate shipment of perishable freight, that merely proving an accumulation of freight or a strike did not shift the burden of proof, but that, to complete its defense under strike and accumulation of freight clauses in the bill of lading, the carrier must show that such strike or accumulation of freight

6. **Operation of Law.** This exception to liability is a very rare one. It can only arise in cases where a loss occurs on a connecting water carrier. Under the Harter Act, vessels are discharged from liability in certain cases where necessary to throw a cargo overboard. Since under the Carmack Amendment the initial carrier is liable for any loss occasioned through the default of a connecting carrier, it has recently been held that where under the Harter Act the water carrier is excepted from liability, this inures to the benefit of the initial rail carrier. That is, defenses which under the laws of the United States are specifically applicable to water carriers may be made available in a state court in an action against an initial rail carrier for damage caused by its connecting water carrier.[30a] Sometimes through operation of law a carrier may be relieved from liability. So where martial law is declared in a district and, as a result, a loss is occasioned through the confiscation of property, the carrier may be relieved from liability. It is obvious, however, that the mere declaration of martial law would not relieve a common carrier, operating in the district thus covered, of all liability to the shipper.[31] Where a carrier invites military authorities which are policing a district which is flooded to confiscate a car of chickens which is at a place where martial law is declared and which cannot be transported owing to the flood, the carrier is liable for such confiscation and a provision in the bill of lading that the carrier shall not be liable for loss due to an act of God or authority of law does not apply, because the action

aused the delay, is not prejudicial here the jury were otherwise carefully instructed that the carrier had oved a cause beyond its control, i. a strike, and that if no negligence its part was shown it was not liable, and that the burden of proving h negligence was upon the plaintiff and a like instruction was given o any cause beyond the carrier's rol, including an accumulation of ht. Pennsylvania R. R. Co. v. t Bros. 37 Sup. Ct. 468; 243 U. 4.

its report prescribing the new of bill of lading the Interstate Commerce Commission held that the carriers could lawfully provide that they should not be liable for damages due to delay in transportation caused by strikes or riots. In the matter of Bills of Lading 52 I. C. C. 671, 705.

30a. Brinson & Kramer v. Mo. So. R. R. (N. C. 1915), 86 S. E. 371; T. & P. Ry. v. Erambert (Tex. 1916), 184 S. W. 274.

31. Chicago & E. I. R. Co. v. Collins Produce Co., 235 Fed. 857. I. C. R. R. v. McClellan, 54 Ill. 71, 5 Am. Rep. 83.

of the carrier in requesting the chickens be confiscated was the direct cause of the loss and not the declaration of martial law.[32] Where martial law was declared in a flood district and at the suggestion and instigation of the carrier a shipment of chickens was appropriated by the military authorities, the carrier, having caused the appropriation, cannot defeat recovery by the shipper on the ground that there was a confiscation.[33] Whether a shipment of chickens in possession of a carrier which was caught in a flood and held up was confiscated by military authorities, martial law being declared in the district, in such a manner as to free the carrier from responsibility, held under evidence for the jury.[34] At common law, when property received by a common carrier under contract of shipment is taken from its possession by a sheriff or other officer acting under judicial process, the carrier's liability ceases.[35] Under U. S. Comp. St. 1901, § § 4283,

32. Chicago & E. I. R. Co. v. Collins Produce Co., 235 Fed., 857, 862.

33. Chicago & E. I. R. R. Co. v. Collins Produce Co., 235 Fed. 857.

34. Chicago & E. I. R. Co. v. Collins Produce Co., 235 Fed. 857.

35. Gulf, C. & S. F. Ry. Co. v. McKie (Tex. 1916) 191 S. W. 576.

In Calf. C. & S. F. Ry. Co. v. McKie (Tex. 1916), 191 S. W. 576, the court said, p. 579:

"We still hold that, if the cotton for the value of which this suit was brought was taken from the possession of the carrier by an officer of the state of Ohio, acting under an attachment issued by a court of that state, and was not returned to the carrier, appellee is not entitled to recover. The identity of the cotton seized by the Ohio constable and that delivered to appellant for shipment was not submitted to the jury; and we are now of opinion that appellee has the right to have that question tried and determined in the trial court. In other words, while the proof may sustain our finding upon that subject as stated in our former opinion, it does not appear that the case cannot be more fully developed upon that issue, and for that reason we hold that appellee is entitled to have it passed upon by a jury."

In Gulf C. & S. F. Ry Co. v. McKie (Tex. 1916), 191 S. W. 576, 578, the court also said:

"However, we agree with counsel for appellant that at common law the weight of authority and reason supports their contention that when property received by a common carrier, under a contract of shipment, is taken from the possession of such carrier by a sheriff or other officer, acting under judicial process, the liability of such carrier ceases, and it cannot be held responsible for its failure to deliver the property to the consignee. M. P. Ry. Co. v. Barnes, 2 Willson, Civ. Cas. Ct. App. § 576; Railway Co. v. Belton Oil Co., 45 Tex. Civ. App. 44, 99 S. W. 430; Bli-

4289, by which the owner of a vessel is relieved of responsibility for loss of goods by reason of fault in navigation under certain circumstances, and by which such owner's liability is restricted to the value of his interest in the vessel and its freight then pend-

ven v. Railway Co., 36 N. Y. 403; Railway Co. v. Wilcox, 48 Ga. 432; Railway Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; McAlister v. Railway Co., 74 Mo. 351; Pingree v. Railway Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479; Burton v. Wilkinson, 18 Vt. 816, 46 Am. Dec. 145; Jewett v. Olsen, 18 Or. 419, 23 Pac. 262, 17 Am. St. Rep. 745; Lemont v. Railway Co. (C. C.) 28 Fed. 920; Stiles v. Davis, 1 Black, 101, 17 L. Ed. 33; Railway Co. v. Bossut, 10 N. M. 322, 62 Pac. 977; Amer. Express Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536; Southern Express Co. v. Sottle, 134 Ga. 40, 67 S. E. 414; Railway Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; Robinson v. Railway Co. (C. C.) 16 Fed. 57; Thomas v. Express Co., 73 Minn. 185, 75 N. W. 1120; 4 R. C. L. 198, 199, 299; 1 Moore, Carriers, pp. 327-331; 2 Hutchinson, Carriers, pp. 821, 829.

"In Stiles v. Davis, supra, which was similar to the instant case, the Supreme Court of the United States, among other things, said: 'After the seizure of the goods by the sheriff under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been at the time in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until diposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant as carriers by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs.' In American Express Co. v. Mullins, supra, the same court, speaking through Mr. Justice Brewer, said:

'While it is the duty of a carrier to safely carry and promptly deliver to the consignee the goods intrusted to its care, yet that duty does not call upon it to forcibly resist the judicial proceedings in the courts of the state into or through which it is carrying them. The company carried the goods to Kansas in obedience to the terms of the shipment. On arrival in that state they were taken by judicial process out of its possession and destroyed; the process being issued in a proceeding in the nature of one in rem. Undoubtedly it was authorized to appear in the Kansas court and contest for the rightfulness of its possession, but it might also notify the owner of the property and call upon him to carry on the litigation. This it did; notified him in time, and

ing for any loss occasioned without his privity or knowledge, the railway carrier which accepted goods for shipment and transferred them to a connecting steamship line was not liable for their loss when the steamship, which was seaworthy, sank after a collision through fault in navigation.[36] Under the Harter Act

received from him an assurance that he would contest the legality of the seizure. This relieved the company from further responsibility, and the owner could no longer complain of it because the judgment of the Kansas court seized and disposed of the property.'

"In Railway Co. v. Yohe, supra, in discussing the question here involved, the Supreme Court of Indiana said:

" 'It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process. * * * The carrier is deprived of the possession of the property by a superior power, the power of the state, the vis major of the civil law, and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the 'act of God or the public enemy.' In fact, it amounts to the same thing; the carrier is equally powerless in the grasp of either.' The other authorities cited above tend more or less to support the same conclusion."

In an action against a carrier for failure to deliver goods, the defense being that the goods had been taken under attachment issued by a justice court in another state, since, in the absence of proof to the contrary, it will be presumed that the law of the other state is the same as Texas law, the power of a justice of the peace to issue an attachment will be presumed, and, since the federal Constitution requires each state to give full faith and credit to judgments of courts of other states, there was no question of law whether the court of the other state had power to issue the attachment, and therefore refusal of an instruction that the carrier was not liable for failure to deliver if the goods were taken under attachment could not be said to be non-prejudicial. Gulf, C. & S. F. Ry. Co. v. McKie (Tex. 1916), 191 S. W. 576.

36. Price v. So. Ry. (N. C. 1917), 92 S. E. 182.

U. S. Comp. St. 1901, § 4283, limiting damages to goods by collision, etc., without the privity or knowledge of the ship owner to the extent of his interest in the vessel and the freight, applies only to the nondelegable duty of providing a seaworthy vessel and not to errors in navigation, and the owner's duty is discharged if he supplies a seaworthy vessel and provides competent operators. Price

water carriers are exempted from liability in certain specified instances and under certain specified conditions. It has been recently held, therefore, that the initial carrier is not liable under the Carmack Amendment for loss which occurs while the goods

v. So. Ry. (N. C. 1917), 92 S. E. 182.

In Price v. So. Ry. (N. C. 1917), 92 S. E. 182, the court said:

"The dispositoin of the present appeal, in its principal features, is determined by the decision of this court in Brinson v. Railroad, reported in 169 N. C. 425, 86 S. E. 371. In that case it was held, among other things, that an initial carrier sued under the provisions of the federal statute of June 29, 1906 (34 Statutes at Large, 594, Chap. 3591), for the loss or damage to a shipment by reason of the default of a connecting carrier, could avail itself of any defense existent in the latter's favor, and that, where such shipment by a designated or usual route was in part by water, the federal statute as to limitations of liability in case of carriers by water could in proper instances be set up and relied upon, citing in support of the position, among other cases, the Hoffman, 171 Fed. 455; Riverside Mills v. Railroad (C. C.), 168 Fed. 987; Lord v. S. S. Co., 4 Sawy. 292, 15 Fed. Cas. No. 8506. Speaking to these authorities in Brinson's Case, the court said:

"'On this question, in Riverside Mills v. Railroad, it was held: "In an action by the shipper against an initial carrier for loss of goods shipped in interstate commerce, under amendment to Hepburn Act, June 29, 1906, the carrier may make any proper defense which can be made in a court of law and which any connecting carrier on the line of which the goods were lost or the injury occurred might make." And in the case of Lord v. Goodall, supra, it was held, among other things, that: "A party using, for the transportation of his goods, an instrument of commerce, which is subject to the regulating power of Congress, must use it subject to all the limitations imposed upon its use by Congress." Both of these causes were affirmed on writ of error in Supreme Court of the United States, the first in Riverside Mills v. Railroad, supra, and the second in Lord v. Goodall, 102 U. S. 541, 26 L. Ed. 224. The deliverance of the higher court, however, dealt with other, chiefly constitutional, questions, and the precise point we are discussing was not directly presented; but, as stated, from the language of the statute and the fact that recovery over is allowed the initial carrier and from the reason and justice of the position, we are well assured that the lower federal courts have taken the correct view, and that in case of loss by sea the initial carrier may avail itself of these federal statutes where the same properly apply.'

"It was further held in the decision that in cases coming properly under these provisions of the federal laws (3 Compiled Statutes 1901, c. 6, §§ 4283-4289, erroneously printed in Brinson's Case as 5 Compiled Stat. 1913), where there was a total loss of vessel, cargo, and freight, 'without privity or knowledge of the owner or owners,' ordinarily no recovery

are in the possession of the connecting water carrier, which under the Federal Statutes governing such carriers is exempted from liability. That is, defenses which under the laws of the United States are specifically applicable to water carriers may be made available in a state court in an action against an initial rail carrier for damage caused by its connecting water carrier.[37] From

could be had; the statute in such cases limiting liability to the owners to the amount or value of their interest in the vessel. On this subject, it was said:

"'These laws, being chapter 5, Laws 1913, corrected by 3 Laws 1901, c. 6, classified in United States Compiled Statutes under section 4289, p. 2946, by which the owner of a vessel is relieved of responsibility, under certain conditions, by reason of faulty navigation and other specified causes, and section 4283 of the same volume, by which the liability of the owner is restricted to the "value of his interest in the vessel and its freight then pending, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners," etc., have been many times construed by the Supreme Court of the United States, and it is very generally recognized that defenses existent by reason of the statutes may be made available in a state court having cognizance and jurisdiction of the cause of action. Railroad v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516; Riverside Mills v. Railroad (C. C.), 168 Fed. 987, and in reference to the last mentioned section, that on limitation of liability, it is held in Norwich v. Transportation Co., 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; Norwich v. Wright, 13 Wall. 104, 20 L. Ed. 585, and other cases, the value of the vessel must be estimated after the collision, and in case the vessel is then sunk and no freight earned, there is usually an end of liability on the part of the owners.'

"In the case to which we have referred a recovery by plaintiff was sustained, but this was for the reason that, on a 'case agreed,' it was not made to appear that the vessel in question was seaworthy or properly manned or equipped, a condition required for the operation of the federal statutes in question, but in the present suit the defendant, assuming the burden of this position, as required by the law, has alleged and proved that the ship in this instance was both seaworthy and properly equipped, and that the vessel with the cargo was an entire loss, and, under the principles approved in our former decision, we must hold that no recovery by plaintiff can be had for this loss."

37. Brinson & Kramer v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 371, 373.

But the evidence must clearly show that the loss on the water carrier was due to an excepted cause. Mallory S. S. Co. v. Harris-Irby Cotton Co. (Tex. 1918), 204 S. W. 789.

a perusal of the language of the Carmack Amendment, making the initial carrier responsible for injuries caused by it or by any connecting carrier, and from the provision also contained in the amendment for repayment of the initial carrier by any other or connecting carrier actually causing the loss, etc., although the initial carrier may be by rail, if any connecting company along the designated or usual route of shipment, there being no route designated, is a carrier by water, and the loss or injury occurs by the wrong of such company, the initial carrier may avail itself of the federal legislation applicable to transportation companies of that character, limiting the amount of recovery in certain instances, and at times relieving of responsibility altogether; the principle being that, in cases coming within the effect of the law, the initial carrier, so far as the shipper is concerned, is held to have contracted for through transportation, and is liable for the default of itself or any connecting carrier, and may avail itself of any defenses or of limitations of liability open to the carrier causing the loss.[38] So in an action against an initial rail carrier for loss of goods at sea while on a connecting water carrier, the railroad can set up any defense which by the federal statutes the

Defenses existing under Act Cong. Feb. 13, 1893, c. 105 (U. S. Comp. St. 1913, §§ 8029-8035), relieving the owner of a vessel of responsibility under certain conditions by reason of faulty navigation, and Rev. St. U. S. § 4283 (U. S. Comp. St. 1913, § 8021) by which the liability of the owner is restricted to the value of his interest in the vessel and its freight then pending, for loss or injury by collision, occasioned without the privity or knowledge of such owner are available to a carrier sued in a state court having cognizance and jurisdiction of the cause. Brinson & Kramer v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 371.

Act Cong. Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1913, § 8031), provides that if the owner of any vessel shall exercise due diligence to make it seaworthy and properly manned and equipped, neither the vessel nor the owners shall be responsible for damage or loss resulting from faults or errors in navigation or arising from dangers of the sea or other navigable waters, acts of God, etc. Held, that where a violent hurricane loosened a porthole and forced sea water upon the cargo, a finding in favor of the steamship company in an action for damages involved the finding that the damage was unavoidable through an act of God, and precluded a recovery against a connecting railway carrier which was guilty of no negligence. Texas & P. Ry. Co. v. Erambert (Tex. 1916), 184 S. W. 274.

38. Brinson & Kramer v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 371, 372.

boat line could have set up in a similar action.[39] And a water line which is not under a common control, management or arrangement for a continuous carriage or shipment with a railroad company is not liable for damage to a shipment of goods delivered to it as an initial carrier and damaged on the line of a connecting rail carrier, under a bill of lading which restricted liability to its own line.[40] The strict rule of the common law whereby a carrier could not escape liability for failure to deliver goods received for carriage, except by showing that such failure was caused by the act of God or the public enemy, has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, without any fraud, collusion, or consent on its part, by an officer of the law acting under authority apparently valid on its face, and when it notifies the consignor of such seizure.[41]

39. Brinson & Kramer v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 371, 373.

40. Levy v. Old Dominion S. S. Co. (N. Y. 1915), 154 N. Y. S., 227, 228.

F. Ry. Co. (Mo. 1915), 179 S. W. 800;

41. Danciger v. Atchison, T. & S. Morgan v. C. & N. W. Ry. (Wis. 1918), 166 N. W. 778; So. Ry. v. Hodgson Bros. (Ga. 1918), 95 S. E. 263; Wells Fargo & Co. v. Ford 238 U. S. 503, 35 Sup. Ct. 864, 59 L. ed. 1431.

VII.

FILING OF CLAIM

1. **Notice of Loss.**
2. **Manner and Form of Giving Notice.**
3. **Waiver of Notice.**

1. **Notice of Loss.** No part of the law of carriers has caused more discomfort to shippers than the provisions in the various bills of lading barring the shipper's right to recover unless notice of loss is given within a specified time. The bills of lading of the different carriers, particularly the live stock contracts prior to the passage of the Cummins Amendment were not uniform on this point. Some contained a provision requiring notice within one day, others a longer period. The Cummins Amendment to the Interstate Commerce Act, in effect June 2, 1915, contained the following provision: "That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." From casual reading it would appear that the necessity of giving notice seems to be entirely obviated if the damage is due to the negligence of the carrier. Since practically all suits brought are due to negligence it is very evident that in the majority of instances the giving of notice may be a useless formality. However, it would not be wise to dispense with this formality until the federal courts have given a definite construction to this provision. So far, only one of them has construed this provision. Recently a federal court has held that where a shipment is damaged in transit, notice of loss is unnecessary, under the Cum-

mins Amendment, and suit may be brought if notice has not been given. Where an interstate shipment of horses was unnecessarily and carelessly held in the railroad yards at an intermediate point, notice of claim for loss was unnecessary; the shipping contract following the Interstate Commerce Act, which declares notice unnecessary for damage in transit by carelessness or negligence.[1] In this case the court said: "As a part of its defense the defendant sets forth the shipping agreement, one provision of which is to the effect that, unless notice of damages was presented in writing within ninety days from the unloading of the horses at St. Louis, all claims would be deemed to have been waived, with the proviso, however, that: 'If loss, damage or injury complained of was due to delay or damage caused or contributed to by the carrier, or its employees, while being loaded or unloaded, or if damaged in transit by carelessness or neglect of the carrier, or its employees, then no notice of claim or filing of claim' would be required. * * * As already stated, the horses were held at Green River for the period of eight days, and it is to be inferred from the complaint that most, if not all, of the damage resulted from such detention. It is the defendant's position that while the horses were so detained they were not in 'transit,' within the meaning of the proviso above quoted, and that therefore the plaintiffs were not relieved from presenting a claim within the time prescribed, and, having failed to present such claim, they cannot now recover. It must be admitted that the meaning of the proviso is extremely obscure. The subject-matter which Congress had under consideration was the extent to which the carrier should be permitted to go in exacting notice and the presentation of claims for damages. In the principal clause it is declared that it shall be unlawful to require notice in less than three months, the filing of claims in less than four months, or the bringing of suit in less than two years. Such a provision would seem to be both clear and reasonable. But why an exception to it? Why, in the absence of fraudulent concealment or some extraordinary disability, excuse the shipper in any case from giving notice or filing his claim or commencing his suit within the period prescribed? No satisfactory answer has been suggested, and apparently none is at hand. We cannot with assurance, therefore, interpret

[1] Hailey v. Oregon Short Line R. Co., 253 Fed. 569.

proviso in the light of the object intended to be accomplished, can a construction be condemned merely because thereunder provision does not commend itself to us as being entirely rea- ble. If, then, we take the only course open to us and give to terms employed their common import, what is the result? To that the phrase 'in transit' is applicable only while in a shipment tually moving is to give to it an unusual and strained construc-

Ordinarily a shipment is understood to be in transit from the t of origin until it reaches the point of destination. So long is the course of being delivered to the place to which it is being ped, it is in transit. A piece of baggage billed from New York oise is in transit all the time it is in the possession of the car- for delivery at Boise—just as much when it is upon a car ding at a station, pursuant to or awaiting orders, or upon a s or station platform for transfer to another car, en route, as n it is upon a car moving forty miles an hour. Not only would lo violence to the ordinary meaning of the phrase if we hold here it is to be understood as equivalent to 'while actually ing,' but such a construction would necessarily result in absurd nctions. As to the duty of giving notice or filing a claim, why ld a discrimination be made between the case of a collision, re the car carrying the shipment is standing on a siding, and where it is moving on a siding? Nor, if we say 'in transit' mited to cases where the shipment is actually in a car, is the truction any more defensible. No semblance of reason can ssigned for requiring notice if the freight is burned in or stolen n a car, and at the same time relieving the shipper from such gation if the theft or fire was in an adjacent freight depot. True, phrase may sometimes be used in a narrow sense; but there is ing here in the attendant language to suggest the exceptional and, to say the least, such a use would contribute nothing to reasonableness of the provision as a whole. The phrase is efore to be understood in the sense in which it is commonly loyed. Upon consideration, I am inclined to the view that the s of classification intended by Congress must be found in the se 'by carelessness or negligence.' It is used in no other place ie entire section, and in the absence of some other ground for ification it appears to be not improbable that the legislative l made a distinction between liabilities resulting from the car-

rier's negligence and those which rest upon a different basis, and accordingly declared that the carrier should not require notice of claims for damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damaged 'in transit,' as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies 'damaged in transit.' In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit.' In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it. A claimant must either allege and prove notice, and the filing of a claim, or must allege and prove negligence. Here the plaintiffs have alleged negligence, but neither the giving of notice nor the filing of claim, and to succeed it will therefore be incumbent upon them to prove negligence." The proviso, that the limitation does not apply to cases of negligence, is in line with what has previously been the law in the State of New York. There it has been held that a four-months' limitation in a bill of lading does not bar claims for negligence.[1] This was on the theory that it would be manifestly unjust to permit a carrier to make a contract for an intrastate shipment to be construed by the courts in accordance with

1. Lynch v. N. Y. C. & H. R. R. Co., 153 N. Y. S. 633, 638.

the laws of the state, and then by its own default and wrong to convert such a contract into a contract involving an interstate shipment to be construed and its validity to be determined by the courts in accordance with the law as pronounced by the federal courts.[2] In this case it was held that a provision in a bill of lading that claims for loss or damage must be made within a specified time is entirely destroyed and rendered invalid by the carrier deviating from the route specified therein, and in such a case, the carrier, having broken in a material part one of the covenants in an express contract to be performed on its part, cannot in reason or justice call upon a shipper to perform his covenants contained in the same contract.[3] Now it should be

2. Lynch v. N. Y. C. & H. R. R. Co., 153 N. Y. S. 633, 638.

Hovey v. Tankersley (Tex. 1915), 177 S. W. 153; Crawford v. Southern R. Co. (S. C. 1915), 86 S. E. 19, 20.

It seems to be the law that where a contract of transportation was executed prior to the Cummins Amendment, and suit was brought after the amendment was effective, it did not apply; as there is nothing in the act to indicate that it was intended to have any retroactive effect. Betka v. Houston & T. C. R. R. (Tex. 1916), 189 S. W. 532.

Of course, it seems almost unnecessary to state that the validity of any stipulation limiting liability in a contract relating to an interstate shipment is a federal question and must be determined under the rules adopted by the Federal Court. M. K. & T. Ry. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 597, 57 L. Ed. 690; Lynch v. Sou. Express Co. (Ga. 1916), 90 S. E. 655.

The notice which may be provided for in the bill of lading must be given, not only in the event of any loss or injury to the goods, but even in the case of a willful misdelivery by the final connecting carrier. Kemper Mill Co. v. Mo. Pac. Ry. (Mo. 1916), 186 S. W. 8.

Furthermore, the reasonableness of the time allowed for notice of loss or damage is not dependent upon whether the goods are perishable or not, the same rule applying in any event. Phillips v. Seaboard Air Line Ry. (N. C. 1916), 89 S. E. 1057.

3. Lynch v. N. Y. C. & H. R. R. Co., 153 N. Y. S. 633, 637.

And under the Carmack Amendment notice of loss need only be given to the initial carrier and does not need also to be given to connecting carriers. Norfolk & W. Ry. Co. v. A. J. Steele & Son (Va. 1915), 86 S. E. 124, 127.

A notice of loss given to one of four connecting carriers within the time provided in the shipping contract is notice to all connecting carriers. Gulf, C. & S. F. Ry. Co. v. Bogy (Tex. 1915), 178 S. W. 577, 578; No. Pac. Ry. v. Wall, 241 U. S. 87, 36 Sup. Ct. 493.

Since it is the duty of the initial carrier to issue a bill of lading covering the entire movement from origin to destination, even though it

noted that while the Cummins Amendment makes it unlawful for the carrier to fix a period for giving notice of claims shorter than 90 days, for the filing of claims shorter than four months, and for the institution of suits shorter than two years, the law does not indicate the time or date from which these several periods of time shall be computed; that is, whether from the date of delivery by the carrier of the damaged property, or in case of loss, after a reasonable time for delivery has elapsed, from the date shown on the bill of lading, or from the occurrence of the loss or of the damage. It seems clear that these provisions are, in common with the other matters governed by the amendment, confined to instances of loss, damage, or injury caused by the carriers. It will be necessary for the carriers to determine what periods of time they will fix for the gving notice of claims, the filing of claims, and the institution of suits. The dates or times from which such periods shall run should also be fixed in the rules. In the interest of thorough understanding and to avoid controversies it is very desirable that these rules be uniform for all the carriers of the country.[4] The New Amendment to the Cummins Amendment (Aug. 9, 1916), did not change its language with respect to the giving of notice or filing or claims. It is apparent there are several ambiguities in the law. In the first place, it is provided inferentially, at least, that the carrier can lawfully provide that notice of claims must be given it within ninety days and claims must be filed with it within four months. In other words, if notice is not given within ninety days and a claim filed within four months the carrier does not have to consider it and is not liable. Suppose a shipment is damaged while being unloaded at destination, by the negligence of the delivering carrier, and the initial carrier in its filed tariffs has

only issues a bill of lading from origin to intermediate points, it is, nevertheless, responsible for a loss which occurs on any part of the movement. Michelson v. Judson Freight Forwarding Co. (Ill. 1915), 109 N. E. 281, 285.

In decisions rendered prior to the passage of the Cummins Act it has been said in the state courts that in determining the reasonableness of a stipulation providing for notice of loss, no fixed rule or test can be laid down because what might be reasonable in one case might not be in another. Crawford v. Southern R. Co. (S. C. 1915), 86 S. E. 19, 20.

4. The Cummins Amendment, 33 I. C. C. 682, 691.

provided that notice of claims must be given it within ninety days, and claim must be filed within four months, does this provision in the law mean that the initial carrier can be held liable if no notice is given, or is the shipper bound to seek recourse against the terminal carrier? It must be recalled that since existing remedies are preserved by law to the shipper he can sue either the initial carrier or any intermediate or connecting carrier that may actually have caused the loss. Now, there is some doubt as to whether, under this provision, if claim is not filed as limited by the carrier, as authorized by the law the claimant is bound to seek recourse against the carrier actually causing the injury or whether he can sue the initial carrier under the Cummins Amendment. Since the Interstate Commerce Act must be construed as a whole there is strong authority for believing that if the damage is occasioned by being unloaded at the terminal, the initial carrier is, nevertheless liable if suit is brought within two years. The same question comes up as to injury in transit. Suppose that a connecting carrier negligently injures the shipment and notice of claim is not filed with the initial or delivering carrier within the ninety day period, can the initial carrier then be held? It seems, however, to be the intent of the new Cummins Amendment to hold the initial carrier liable in all cases of negligence, even if the notice of claim has not been filed within four months. The difference in proof between a suit under the two year provision, where no notice of claim has been given, or no claim filed, and one where the loss or damage claim is filed within the four months' time, after proper notice, should be noted. A carrier is an insurer of the goods. Once it is shown that the goods have been delivered to the carrier in good condition, that they were delivered in bad condition, that notice of claim was filed with the carrier within ninety days and the claim filed within four months, the claimant's case is absolutely complete and he is entitled to recover, in the absence of countervailing evidence by the carrier. Where, however, notice of claim has not been filed, then the burden of proof rests affirmatively upon the claimant to show the injury occurred owing to the negligence of the carrier or its agents. A provision in a live stock contract providing for notice within a specified time does not constitute a restriction upon the liability of the carrier, but is estab-

lished merely as a reasonable regulation for the government of the parties in performing the contract and in enforcing their rights thereunder.[5] In that respect those stipulations are unlike one which contains a contract for a reduction of the amount to be recovered, or the degree of care, or one, in fact, which affects in any other particular the liability of the carrier; but, the validity of such regulations as this depends upon their reasonableness, and not upon the question whether or not there is a consideration therefor, inasmuch as the stipulations are founded upon the considerations of the contract of shipment.[6] The object of requiring notice of the place and nature of the injuries is to give

5. St. Louis & S. F. R. Co. v. Keller, 90 Ark. 308, 119 S. W. 254; M. & N. A. R. Co. v. Ward, 111 Ark. 102, 163 S. W. 164.

6. St. Louis Southwestern Ry. Co. v. I. W. Haynie & Co. (Ark. 1915), 179 S. W. 170, 171, 172.

A carrier of live stock may by stipulation provide that notice of any claim for loss or damage be given by the shipper within a reasonable and prescribed time and in a certain manner as a condition precedent to liability for loss. M. K. & T. Ry. v. Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; Castner v. Oregon-Washington R. & Nav. Co. (Wash. 1916), 155 Pac. 167.

It is such when the facts are undisputed and susceptible of only one reasonable inference; otherwise, it is a question of fact for the jury. Crawford v. Southern R. Co. (S. C. 1915), 86 S. E. 19, 20.

So it is held the question as to whether notice was given as required by the contract of shipment is for the jury. Ball v. Lusk (Mo. 1915), 175 S. W. 238.

And where a carrier pleads a provision in the bill of lading that notice of loss or damage must be given within 30 days, the shipper has the burden of proving that such notice was given. Adams Express Co. v. Cook (Ky. 1915), 172 S. W. 1096.

But a carrier can avail itself of the defense presented by the limitation of liability contained in the bill of lading without especially pleading the same where the bill of lading has been offered in evidence by the plaintiff. Ex parte Kilgore (Ala. 1915), 67 So. 1002.

The scope of such a provision has been applied to a case where through the negligent delay in shipping apple barrels, apples at the point of destination rotted. A claim for such injury is within the scope of a provision in the bill of lading issued for the apple barrels that claims for loss, damage or delay must be made within four months after delivery, since the clause in the bill of lading was obviously intended to be comprehensive and to include all damages that reasonably might be anticipated to follow the negligent breach of the carrier's duty to deliver the barrels within a reasonable time. Bailey v. M. P. Ry. Co. (Mo.), 171 S. W. 44, 46.

the carrier an opportunity for a full and fair investigation of such injuries when and where it will be most certain, easy, and expeditious. The notice is required to be in writing, so that the nature of the shipper's grievance may be definitely and clearly stated.[7] Since carriers will undoubtedly incorporate provisions in the bill of lading in line with the Cummins Amendment, and will provide for the limitations authorized by that law, it behooves the shipper to note that he is not relieved from the obligation of using diligence to present his claim. A shipper suing a carrier for loss or damage to a shipment has the burden of proving that he presented his claim to the carrier with the time fixed by the bill of lading.[8] So it has been said that, (1) Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, the burden of showing the performance of such condition rests upon the shipper, and if he fails to show performance he cannot recover. (2) This rule applies not only to a case where it is made to appear during the progress of the trial that the plaintiff is seeking to recover upon a shipping contract containing such condition, but also to one where it has been counted upon in his petition or set out as defensive matter by the carrier. The burden of showing compliance with a shipping contract requiring the presentation of claims for damage to the carrier, within a given time, is on the shipper who seeks to recover for a loss or injury to goods, even though he alleged a contract of shipment in general terms and the contract merely appeared in the evidence. The stipulation, therefore, is not merely a conventional limitation of the shipper's right to sue the carrier as he is left at liberty to sue at any time within the period fixed by the statute of limitations, but is is an essential condition of the contract by which he is required to make his claim within the prescribed time, or in season for the carrier to ascertain the facts for his safety against spurious claims, and, having presented his claim, as required by the contract, the shipper may delay suit. He must, though, show

7. St. L. I. M. & S. Ry. Co. v. Jacobs, 70 Ark. 401, 68 S. W. 248; St. L. S. W. Ry. Co. v. Grayson, 89 Ark. 154, 115 S. W. 933; St. L. I. M. & S. Ry. Co. v. Shepherd, 113 Ark. 248, 1685, S. W. 137; St. Louis, I. M. & S. Ry. Co. v. Nunley (Ark. 1915), 179 S. W. 369, 370.

8. Henry v. C. M. & P. S. Ry. Co. (Wash. 1915), 147 Pac. 425, 431.

performance of the provision in order to recover.[9] Therefore a shipper should keep careful records of the filing of his claim. The Interstate Commerce Commission has held a provision limiting the time for filing claims for loss or damage to express shipments to four months, is not in conflict with the Cummins Amendment or unreasonable. The Amendment does not confine such limitation to undisclosed loss or damage.[10] The limitation concerning the giving of notice when not complied with has been held to be a bar to an action against an initial carrier for loss arising from the conversion of the goods by the final carrier.[11] A contract between a carrier and shipper for the transportation of goods, containing the followng stipulation: "Claims for loss or damage must be made in writing to this company within ten days after arrival of the goods at their place of ultimate destination in

9. Culbreth v. Atlantic Coast Line R. Co. (N. C. 1915), 86 S. E. 624, 626.

Where a shipper gave notice of injuries to cattle, the fact that the claim filed with the notice was not so large as the amount sued for will not defeat recovery, although it should be considered on the question whether the amount sued for was excessive. Pecos & N. T. Ry. Co. v. Holmes (Tex. 1915), 177 S. W. 505.

In an action for the damages to such shipment, the burden was on plaintiff, where no written notice was given, to show such actual knowledge of the damaged condition of the shipment on arrival and delivery to the consignee as would cause the delivering carrier to know that a claim for damages would be made. St. Louis, I. M. & S. Ry. Co. v. Cumbie (Ark. 1915), 177 S. W. 910.

A provision in a bill of lading requiring written notice of the intention to claim damages on account of a shipment to be given to the delivering carrier is reasonable, and compliance therewith is a condition precedent to a recovery and can only be dispensed with by showing that the delivering carried had actual knowledge of the damaged condition of the shipment on arrival, and that a claim therefor would be made. St. Louis, I. M. & S. Ry. Co. v. Cumbie (Ark. 1915), 177 S. W. 910.

Where a contract for the shipment of live stock required the shipper, as a condition precedent to any right of action for loss or injury to the animals, to serve written notice, setting out in detail a full statement of losses or injuries and the amount thereof, which was for the avowed purpose of enabling the carrier to investigate and settle such claim before suit, the shipper may, in an action for injuries to live stock, recover damages in excess of the amount claimed in the notice; the notice being merely to afford the carrier an opportunity to investigate. Texas & P. Ry. Co. v. McMillen (Tex. 1916), 183 S. W. 773.

10. Express Rates, Practices, Accounts, and Revenues, 43 I. C. C. 510.

11. Dodge & Dent Mfg. Co. v. Penn. R. Co., 162 N. Y. S. 549.

case of fruit, vegetables, and other perishable articles, and within thirty days after arrival at ultimate destination in case of other freight, and unless claims are so made this company shall not be liable"—even if valid and enforceable—relates only to claims for the loss of or injury to goods, and has no applicability to an action for special damages occasioned by negligent delay in the transportation of goods.[12] A condition in a bill of lading that claims for loss or damage must be made in writing to the carrier at point of origin or point of delivery within four months after delivery of property, is reasonable and binding on a shipper in an action against a terminal carrier, although made by initial carrier.[13] The provision of a bill of lading, requiring, as

12. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

So the statement in a shipping contract that the measure of damages for loss or injury to property shall be based upon the invoice price to the consignee at the place of shipment or upon a specified amount does not apply to cases of negligent delay in the transportation or delivery, but refers solely to loss, injury, or damage to the property itself. Chicago, R. I. & P. Ry. Co. v. Cunningham Comm'n Co. (Ark. 1917), 192 S. W. 211, 213; Elliott v. C. M. & St. P. Ry. Co. (S. Dak.,1917), 161 N. W. 347, 349; Panhandle & S. F. Ry. Co. v. Bell (Tex. 1916), 189 S. W. 1097. Also see:

Morrow v. Mo. Pac. Ry. Co., 140 Mo. App. 200, 123 S. W. 1034, and authorities there cited. Also, see 2 Michie on Carriers, § 1423; Balt. & Ohio Exp. Co. v. Cooper, 66 Miss. 558, 6 South. 327, 14 Am. St. Rep. 587; 4 Elliott on Railroads (2nd Ed.), § 1512, pp. 229, 230. The discussion and authorities cited in Houtz v. Union Pac. R. Co., 33 Utah, 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628, to which is appended a valuable case note, may also prove of service.

13. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

To require the shipper of an interstate shipment, in order to recover for a loss, to file his verified claim with the connecting carrier which caused the injury, as is provided in a separate bill of lading issued by that carrier, would defeat the purpose of the Carmack Amendment, which was to relieve shippers of the difficult and almost impossible task of determining on which of several connecting lines the damage occurred. M. K. & T. Ry. Co. v. Ward, 37 Sup. Ct. 517, 244 U. S. 383.

In McElwain v. U. P. R. R. (Neb. 1917), 163 N. W. 845, the court said:

"The following statement of the law is pertinent to this inquiry: If, because of wrongful delay, the shipment sustains physical injury, and in consequence a depreciation in value, a provision in the contract of shipment requiring notice of claim for loss or injury to the shipment is applicable. * * * On the other hand, it is very generally held that a stipulation for notice of this character applies only to a loss of, or physical injury to, a shipment of live stock caused by delay and con-

condition to liability of carrier, the filing of claims for loss, damage, or delay, has no application in action for conversion by the carrier, refusing tender of all charges and selling the goods.[14] It also must be remembered that there is no presumption of law that a shipper claiming damages for delay in transportation of goods gave the written notice of claim required by the bill of lading.[15]

2. **Manner and Form of Notice.** Any written communication (where notice in writing is required), which apprises the carrier with reasonable certainty that a claim will be filed, and de-

sequent depreciation in value. In other words, where the shipper suffers special damages because of wrongful delay, no compliance with the stipulation is necessary to entitle him to recover for special damages, and the reason is that the notice would be useless in determining the amount of such loss. In conformity with this principle, it has uniformly been held that a stipulation that notice of damages should be a condition precedent to recovery for any injury to the shipment during transportation has no application to damages caused by the loss of market, to loss resulting from a decline in the market value of the shipment, or to the expense of feeding stock, resulting from delay in transportation. And no notice is necessary to authorize the recovery of damages from shrinkage resulting from the holding of the cattle after transportation was completed, due to the loss of market. * * * Nevertheless it has been held that, where the provision requiring notice is not confiend to loss of, or injury to, live stock covered by the contract, but expressly includes damages for delay, it must be construed as including a loss sustained by a decline in the market, and that a provision in a bill of lading to the effect that claims for loss, damage, or delay must be made in order to render the carrier liable was not limited to claims for damages to the goods shipped. 10 C. J. 334. Plaintiff's claim was not a claim for "damages for loss of or injury to" the stock, and notice was not required by the bill of lading. Gault v. Atchison, T. & S. F. R. Co., 92 Kan. 464, 139 Pac. 1014; Elliott v. Chicago, M. & St. P. R. Co. (S. D.), 161 N. W. 347."

Where the bill of lading provides that, as a condition precedent to the right to recover "damages for loss of or injury to" live stock, the shipper shall give notice in writing of his claim therefor, notice is not required, where the claim s solely for damages sustained by the loss of a favorable market, and for shrinkage in weight and expense of feeding at destination while awaiting the next market; such damages being caused by reason of delay in transportation. McElwain v. U. P. P. Co. (Neb. 1917) 163 N. W. 845.

14. Dowling v. Seaboard Air Line Ry. (S. C. 1917), 93 S. E. 387.

15. Murray v. A. C. L. R. Co. S. C. 1917), 93 S. E. 387.

ng the shipment with such definiteness that it can be traced
e carrier without undue hardship, is sufficient notice. Giv-
ıe date and place of arrival, car number and initial, is suf-
:. Section 3 of the Uniform Bill of Lading provides as fol-
"Except where the loss, damage or injury complained of is
› delay or damage while being loaded or unloaded, or dam-
n transit by carelessness or negligence, as conditions prece-
o recovery, claims must be made in writing to the originat-
· delivering carrier within six months after delivery of the
rty (or in case of export traffic, within nine months after
ry at port of export), or, in case of failure to make de-
, then within six months (or nine months in case of ex-
:raffic), after a reasonable time for delivery has elapsed;
ıits for loss, damage or delay shall be instituted only within
ears and one day after delivery of the property, or, in case
lure to make delivery, then within two years and one day
a reasonable time for delivery has elapsed." In construi-
similar provision in the old bill of lading which provided
:laims must be filed in four months, the Interstate Com-
: Commission issued Conference Ruling 456 which is as
's: "It is the view of the Commission that the provision
uniform bill of lading, requiring that claims for loss, dam-
›r delay be made within a period of four months after the
ıent was made, is legally complied with when the shipper,
;nee, or the lawful holder of the bill of lading within the
l specified, files with the agent of the carrier, either at the
of origin or the point of delivery of the shipment, or with
:neral claims department of the carrier, a claim or a written
: of intended claim, describing the shipment with reason-
lefiniteness. In all cases the provisions of the standard form
e presentation of claims, which was approved by the Com-
›n on December 2, 1913, should be complied with so far as
›le, and proof or evidence of the claim should be presented
: carrier within a reasonable time." A distinction should
ıwn between the giving of notice that a claim will be filed,
he claim itself. The giving of notice may be broad and
nal, unsupported by documents, whereas in filing a claim,
nount of the damage should be given, and the claim sup-
l by the expense bill and bill of lading wherever possible,

together with such information as called for by the standard claim forms. Under the Cummins Amendment ninety days is allowed for giving notice of a claim, and four months for filing the claim itself. A claim for the value of a shipment of flour misdelivered by the carrier is sufficiently made to satisfy the requirement of the bill of lading that claims based on failure to make delivery shall be made in writing within four months after the time for delivery has elapsed, where the shipper, after making an investigation in response to a telegram from the carrier's traffic manager, telegraphed the latter five days after the arrival of the flour at destination, "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle."[16] And a consignee's written receipt for the

16. Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co. 36 Supt. Ct. Rep., 541, 542, 241 U. S. 190, 60 L. Ed.—

In an action against a common carrier for damages, due to failure to notify consignor of nondelivery of goods, failure to present a formal bill as a claim for damages within the time limited in the contract was not fatal, where defendant was notified in writing that the consignor had a claim against them and insisted upon its payment; such notification having been given in due time. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

Where stipulations in bill of lading for filing notice of loss are reasonable and valid, the written notice of loss need not be expressed in any special way, if it is a plain and intelligible statement of the demand. Phillips v. Seaboard Air Line Ry. Co. (N. C. 1916), 89 S. E. R. 1057.

Under a shipping contract requiring the shipper to give written notice to carrier within four months of delivery, for loss, damage or delay, held that notice of damage to berries "on account of delay" could not mislead nor relieve the carrier of liability, where the damage was caused not by delay but by improper care in transit. R. W. Gess Commission Co. v. Illinois Cent. R. Co. (Mo. 1916), 186 S. W. 1136.

There is no particular form in which notice need be given. It must be sufficiently clear as to apprise the carrier of what is claimed and give it an opportunity for a timely investigation. Slider v. P. M. R. R. (Mich. 1917), 161 N. W. 961, 962.

A written claim for damages to a shipment of live stock under a contract requiring such claim to be filed within 30 days after their arrival at destination, which sufficiently identified the shipment, was not invalid because "1907" instead of "1915" was written therein as the date of the shipment. Baird v. Denver & R. G. R. Co. (Utah 1916), 162 Pac. 79.

So it seems that even though the bill of lading provides that the notice of injury to live stock be verified, it is complied with by an unverified letter, especially if the carrier does not insist upon its verification within the time prescribed for giving n[illegible]

I. C. R. R. v. Atkinson & McDonald Co. (Miss. 1917), 74 S. O. 616.

In Illinois Cent. R. Co. v. Atkinson & McDonald Co. (Miss. 1917), 74 So. 616, the court said, p. 617:

"As regards the first proposition, we think, under the facts of this case, that the rule requiring the notice to be filed, verified by affidavit, within ten days after the injuries occured, that there was a substantial compliance with it by the letter written, especially since the railroad company did not, on receipt of that letter, insist on the claim being verified before the expiration of the ten days. The notice given by appellee put the company upon notice of the claim, and it could ascertain all available facts, and, if it desired to insist upon the claim being verified by affidavit, should have given notice of its insistence on this requirement. It was held in Yazoo, etc., R. Co. v. Bell, 111 Miss. 82, 71 South. 272, that this particular clause was unenforceable, as being without consideration, and the bill of lading in that case contains the same clause as the one in this case."

Where, upon delivery of horses by carrier after injury from derailing accident, shipper signed receipt to which was attached statement of damage, although not verified as required by contract of carriage, and carrier accepted it without objection, it was sufficient, since the purpose of the notice was to advise carrier that claim was made, so that a timely investigation may be had. Slider v. P. M. R. Co. (Mich. 1917), 161 N. W. 961.

A provision in a bill of lading that a written claim of loss must be made within four months after a reasonable time for delivery has elapsed is not for the purpose of escaping liability, but to facilitate prompt investigation, and is held to have been sufficiently complied with when, prior to the expiration of the four-mouths period, oral complaint was made to the company's shipping agent of its failure to deliver, and the company acted on such complaint, and not only promised the shipper to send tracers and to make an investigation, but complied with its promise, and a month after such complaint the shipper was advised by the agent to wait a little longer, as he understood that the goods had been sold. Shark v. Great Northern Ry. Co. (N. Dak. 1917), 164 N. W. 39.

A stipulation as to notice of a claim for injury to goods while being transported by a common carrier should be given a reasonable construction, and a substantial compliance therewith is all that is required, in view of the object of the requirement of notice. United Brokers' Co. v. Southern Pac. Co. (Ore. 1917), 169 Pac. 114.

In a consignee's action for damages to tomatoes shipped under a bill of lading, requiring notice of a claim for damage to be made in writing to the agent at place of delivery upon arrival, or within 10 days after delivery, the consignee's timely presentation of a written statement of a report of their condition, signed by the carrier's inspector, bearing the name of the consignee, stating the damage and the manner in which it occurred, and that the consignee would repack the tomatoes and claim damages, was a sufficient notice. United Brokers' Co. v. Southern Pac. Co. (Ore. 1917), 169 Pac. 114.

It has been held that a written communication by the railroad company's

delivery of live stock is not the written notice of claim for damages required under the bill of lading.[17] Bad order notations on the freight bill do not take the place of such notice.[18] What the law requires the claimant to do is to give to the carrier such a notice as will reasonably apprise it that there has been an injury

local agent at the place of destination made within the time limit prescribed, which stated that animals had been injured, and that claim would be made, is a sufficient compliance with the requirements for notice. Snyder v. King (Mich. 1917), 165 N. W. 840.

17. Johnson v. Mo. Pac. Ry. Co. (Mo. 1916), 187 S. W. 282.

18. Johnson v. Mo. Pac. Ry. Co. (Mo. 1916), 187 S. W. 282.

In a typical case a consignee of freight was notified that it had arrived in a damaged condition and a notation to this effect was made on the expense bill. The consignor notified the claim agent of the damage and said a claim would be filed. An employe of the consignee told the station agent of the carrier that a claim would be filed, but no notice of the claim was given. It was held that the notation made by the agent of the delivering carrier on the expense bill was not in effect a notice in writing in compliance with the stipulation. Even if it should be said that the agent acted for the shipper, and not for the carrier, in making the notation, it was not such notice to the carrier as it was entitled to. Nor was the notice given by the shipper to the delivering carrier nor that given by the agent of the consignees, that a claim for damages "would be filed," a compliance. St. Louis Southwestern Ry. Co. of Texas v. Overton (Texas 1915), 178 S. W. 814, 816.

Nor is it a compliance (with the provision) to inform the agent at the place of destination that there will be a claim against the company for damages. To impart the information that a claim will be presented is not to present a claim for loss, damage or detention. It does not inform the carrier of the nature, extent, amount or cause of damage. It gives no definite statement of facts upon which an investigation may be had, or which shows that an investigation is required. Kidwell v. Oregon Short Line Ry., 208 Fed. 1, 3, 125 C. C. A. 313. Also see, to the effect that oral notice is not sufficient, Olsen v. C. B. & Q. Ry., 250 Fed. 372.

There is no special form necessary for the giving of a notice of claim, so a claim for the value of a shipment of flour misdelivered by the carier is sufficiently made to satisfy the requirement of the bill of lading that claims based on failure to make delivery shall be made in writing within four months after the time for delivery has elapsed, where the shipper, after making an investigation in response to a telegram from the carrier's traffic manager, telegraphed the latter five days after the arrival of the flour at destination, "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle." Georgia F. & A. R. Co. v. Blish

to the shipment; give a sufficient description of the shipment so that the carrier may reasonably be able to identify it and that the shipper intends to file a claim. This notice may be served by wire or may be in the form of a letter, but it must be written in some way so that the carrier has received it and can file it. A

Milling Co., 36 Sup. Ct. 451; 241 U. S. 190, 60 L. ed. 948.

And where a carrier was well acquainted with the injuries to plaintiff's cattle and frequent communications were interchanged, the carrier's liability being recognized, recovery by the shipper cannot be defeated on the ground that he failed to give written notice within 10 days after unloading at destination, as required by the contract of shipment. So. Pac. Co. v. Stewart, 233 Fed. 956.

And the knowledge of the station agent at destination that the stock was injured does not render the written notice unnecessary. Notice to an officer or station agent of the connecting carrier at final destination must be deemed to satisfy the requirement of a stipulation in a through bill of lading for an interstate shipment of cattle, issued by the initial carrier, that the shipper, as a condition precedent to his right to recover for any injury to the cattle while in transit, shall give notice in writing of his claim to some officer or station agent "of said company" before the cattle are removed from the place of destination or mingled with other stock, in view of the Carmack amendment, under which the bill of lading was issued, making the connecting carrier the agent of the receiving carrier for the purpose of completing the transportation and delivering the property, and of a further stipulation in the bill of lading that its terms and conditions shall inure to the benefit of any connecting carrier over whose line the cattle shall pass. Northern Pac. Ry. Co. v. Wall, 36 Sup. Ct. 493; 241 U. S. 87; 60 L. ed. 905.

That the carrier's local agent saw live stock when it arrived and knew of its bad condition, or made "bad order" report to the company, did not dispense with the notice of damage required by a written contract of interstate shipment to be given at destination or before stock was mingled with other stock. O'Briant v. Pryor (Mo. 1917), 195 S. W. 759.

In McRary v. So. Ry. Co. (N. C. 1917), S. E. 107, the court said, p. 107:

"It is further shown that the consignee, Helen Ivey, in presenting her claim, stated the amount of damages at $110, and it is insisted that she should not be allowed to recover a greater sum; but in this requirement, usually provided for by a clause in the bill of lading, the amount demanded is not ordinarily of the substance, and is not required to be given in making the claim. The provision is inserted and upheld as a reasonable stipulation, more especially for the purpose of notifying the carrier that a claim for damages is made, and directing its attention to the matter at or near the time, and with a view of enabling it to procure evidence disclosing the real facts of the transaction, and unless there had been a payment in satisfaction or adjustment of the claim, we see nothing that should estop the plaintiff from a recovery of her actual loss.

carrier may incorporate in the contract of shipment a stipulation for written notice of damages. But it is sometimes difficult to ascertain the exact manner of giving the notice. As has been seen, the form must be sufficiently specific to apprise the carrier of the damage and intention to file a claim, with reasonable cer-

This seems to be a proper deduction from authoritative cases dealing with the subject, as in St. Louis, etc., R. R. v. Starbird, Adm'r, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917, decided April 30, 1917, where it was held, among other things, that the notice in writing stipulated for in a bill of lading need not give the amount of damages claimed."

In Taft & Van Dyke v. A. C. L. R. Co. (N. C. 1917), 93 S. E. 752, suit was brought to recover damages for injury to furniture shipped over defendant's line in interstate commerce, the amount claimed being $62.89. The court held, and so adjudged, that plaintiff was not entitled to recover, as he failed to comply with the following stipulation of the bill of lading:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

It appears that the goods arrived at Greenville, N. C., on different days in 1914, and the agent saw their condition and noted it on the receipt for the freight charges, which was evidently done to enable the plaintiff to file his claim according to the requirements of the contract between the shipper and the defendant; but the plaintiff did not file any written claim until October 10, 1914. The court said: "We have held in several cases that the mere knowledge of the carrier's agent at the place of delivery as to the condition of the goods would be sufficient notice and takes the place of a written claim. Rabon v. Railroad Co., 149 N. C. 59, 62 S. E. 743; Kime v. Railroad Co., 153 N. C. 398, 69 S. E. 264; Id., 150 N. C. 451, 72 S. E. 485; Id., 160 N. C. 457, 76 S. E. 509, 43 L. R. A. (N. S.), 617; Duvall v. Railroad Co., 167 N. C. 24, 83 S. E. 21; Horse Exchange v. Railroad Co., 171 N. C. 65, 87 S. E. 941; Baldwin v. Railroad Co., 170 N. C., 12, 86 S. E. 776; Mewborn v. Roalroad Co., 170 N. C. 205, 87 S. E. 37; Reynolds v. Express Co., 172 N. C. 487, 90 S. E. 510. It is said by the court, in Mewborn v. Railroad Co., supra, that this principle, by which actual knowledge acquired by the delivering carrier's agent of the injury to goods, and the extent of the damages, will be a sufficient notice or claim of loss, notwithstanding the provisions in the bill of lading that the claim shall be in writing, will be adhered to by this court, in the absence of a contrary decision of the highest federal court. At the October term, 1916, the United States Supreme Court decided that such a stipulation in a bill of lading is reasonable and valid, and must be complied with by the shipper, and, if he does not comply with it, he cannot recover damages (St. Louis, etc.,

. Frequently shipping contracts provide simply that e" must be given. In other cases "written notice" is speci- Where "written" notice is specified, oral notice is clearly ifficient, unless the carrier has waived the provision. If : "notice" is specified, then anything which gives the car-

v. Starbird, 243 U. S. 592, 37 t. 462, 61 L. Ed. 917 (April); and that actual knowledge gent of the carrier, as to the n of the goods, is not equiv- such claim of loss. Refer- this case, we said, at this Bryan v. L. & N. R. Co., 93 50: 'We are of opinion that al notice to the clerk in the Line Office is not a com- with the contract. It is d that the notice shall be ng. There are very obvious why written notice should more protection to the. than mere verbal notice clerk in the office who may it. Our decisions have been contrary, but the Supreme f the United States has re- ecided, in St. Louis, I. M. & o. v. Starbird (243 U. S. 592) . Ct. 462 (61 L. Ed. 917),), 1917, that: "A stipulation ough bill of lading for an in- shipment of peaches that the issuing the bill of lading shall ield liable for damages unless for damage is reported by signee in writing to the ter- rrier within 36 hours after the e has been notified of the ar- the freight at the place of is valid and not unreason- It is useless to quote more e opinion. The whole tenor licates that the court regard- stipulation that the notice in writing as an essential part of the contract and that unless complied with a recovery cannot be had.' As the court also said in that case, it is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do. The court said, in Southern Express Co. v. Caldwell, 21 Wall. (88 U. S.) 264, 22 L. Ed. 556, that a stipulation of this kind is valid. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. And it is intrinsically just. The court held that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy; and, further, that an agreement that, in case of failure by the carrier to deliver goods, he shall not be liable, unless a claim shall be made by the bailor, or by the consignee within a specified period, if

rier knowledge should suffice. If the notice is to be given to agent, mailing is not sufficient, unless actually received by t carrier. In other words, depositing a notice of claim in the m is not notice to the carrier, until received by it.[19] Generally spe

that period be a reasonable one, is not against the policy of the law and is valid. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within 90 days. Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 762, 45 L. Ed. 429. And this court decided the same way in Lytle v. Telegraph Co., 165 N. C. 504, 81 S. E. 759, and further that the stipulation as to a written claim for loss was not complied with by a verbal statement to the agent of the company that the particular message had been delayed and the company would have to pay for it.

"In this case, there was no written notice of loss given, nor even any verbal or written statement by the consignee that he intended to claim any damgages, until long after the four months had expired, although he had ample time to file such a notice or claim of loss. The receipt for freight charges was handed to the consignee by the agent, and he has it now; but the notation thereon was no compliance with the stipulation in the bill of lading. It may be added that the consignee himself took our view of the matter, as to this stipulation, and was conscious tha written claim of loss was required him, because he did file such a cla but entirely too late to be of service to him. The carrier wo be at a great disadvantage if he t to rely upon mere knowledge of agent, or a verbal notice to him, the federal courts, for it would sult in great confusion, and unc tainty as to the nature of clai and prevent their orderly and int ligent consideration. In many cas the special facts would be involv in doubt, if carriers had to rely up the memory of their agents as claims for losses. It follows th there was no error in the ruling the court."

But it has also been held that notation by a railway agent on freight bill as to injuries to shi ment was not a compliance with t of lading stipulation for written n tice of loss required to be filed with a given time. Taft & Van Dyke A. C. L. R. Co. (N. C. 1917), 93 E. 752.

19. An oral notice of claim to station agent is insufficient. Joh son v. Missouri Pac. Ry. Co. (M 1916), 187 S. W. 282; also s C. R. I. & P. Ry. v. McElrea (Okla. 1918), 169 Pac. 628; I. C. R. v. Davis (Miss. 1916), 72 S. 874.

But see *contra*, Blair Horse & Mu Co. v. St. G. & G. I. Ry. (Mo. 191 180 S. W. 412.

The contract notice, requiring

ing notice of a claim must be given to the person agreed upon by the bill of lading. So a shipper's filing of claim against a railroad for loss of goods and delay in delivery of others with an agent at

shipper to give notice to the carrier within four months of loss or damage to shipment, is for the purpose of giving the carrier opportunity to investigate the merits of the claim while the facts are fresh and information readily obtainable. R. W. Gess Commission Co. v. Illinois Cent. R. Co. (Mo. 1916); 186 S. W. 1136.

Where a shipper of cattle addressed his notice of claim for negligent delay, which the contract required to be given before the stock was removed from the place of destination, to the building of another railroad company which was a part of the carrier's system, and the carrier's claim agent replied to the notice, the fact that it was not addressed to the carrier is no ground for objection. Rissler v. Missouri Pac. Ry. Co. (Mo. 1916), 183 S. W. 676.

The requirement of a contract of shipment, that notice of claim for loss be given at the point of shipment or delivery, is not satisfied by mailing it to another point. Equity Elevator Co. v. Union Pac. Ry. Co. (Mo. 1915), 177 S. W. 773.

Where a bill of lading covering a shipment of peaches required written notice of any damages to the shipment to be given the delivering carrier within 36 hours after their arrival at destination, to excuse such written notice it was necessary that personal notice be given to the employe or agent of the carrier whose duty it would be if written notice had been received to make the inspection to ascertain the nature and extent of the damage, and noncompliance was not excused by the fact that longshoremen who unloaded the peaches at the carrier's dock knew they were in a damaged condition, or the fact that the carrier maintained an inspector at the dock, it not appearing that he had any duty to perform concerning the peaches. St. Louis, I. M. & S. Ry. Co. v. Starbird (Ark. 1915), 177 S. W. 912.

In St. Louis, I. M. & S. R. R. Co. v. Furlow (Ark. 1909), 117 S. W. 517, the identical question presented here was discussed. In that case the court held that the provision in the bill of lading requiring notice of loss or damage to be given to a carrier meant actual notice. The court held that the provision was valid and enforceable and said:

"In the stipulation in the case before us the notice in writing was required to be served within one day after the delivery of the stock at destination. The object of the notice was to give the carrier an opportunity to fully and fairly investigate the claim for damages before the horses should be placed beyond the power of the carrier to examine and inspect by reasonable exertion. It is obvious that this could have been done only by actual notice. The contract says that the notice must be served within the one day, and this means actual notice. Notice by mail, then, would not be sufficient unless it was received within the one day."

In Johnson v. N. Y. N. H. & H. R. R. Co., 88 Atl. 988, it was held that notice by mail might be given if

another station than at the point of origin or destination was not in compliance with the contract of shipment that claims for loss or delay would have to be made in writing at the point of de-

"seasonably mailed" before the expiration of the time limit.

I. C. C. Conference Ruling 462 provides as follows:

"Carrier Must Investigate Before Paying Claims—Upon further consideration conference Ruling 15 is modified as follows:

"A carrier cannot shield itself from responsibility in paying a claim by accepting the authority of a connecting line to pay it, but must ascertain the lawfulness of the claim and allow it or not upon the basis of its own investigation. This is not to be understood, however, as requiring each carrier interested in the claim to make an independent investigation. The principle of direct investigation embodied in the rules of the freight claim association, whereby the carrier against which a claim is presented undertakes to make the investigation for itself and for the other carriers concerned in the joint movement out of which the claim arises, is approved by the commission as a means of expediting the adjustment of claims. In all cases, however, the investigation so made must be thorough and must disclose a lawful basis for payment before the claim is adjusted. (See Rulings 68 and 236)." The Commission held In re Express Rates, 24 I. C. C. 380, p. 396, that express companies should dispose of loss and damage claims within six months at the outside.

In Southern Pac. Co. v. Setwart, 233 Fed. 956, the court said, p. 959:

"The defendant urges that the court below erred in refusing to charge, as requested, that the plaintiff could not recover for any loss or damage to the cattle, for the reason that he failed to make written demand on the defendant within 10 days after unloading at the final destination, when he knew of all the damage to the cattle, or could, by the exercise of reasonable diligence, have known the same. The requested instruction was in accordance with the defense pleaded in the defendant's answer. To that defense the plaintiff had replied that he was relieved from compliance with the provision as to notice in writing within 10 days by the facts that on July 4, 1913, and at all times subsequent thereto, the defendant had full knowledge and notice of the injuries and damages to the plaintiff's cattle; that prior to reloading the cattle on that day, 5 of them had died; that the defendant found it necessary to provide an additional car in which to reload 13 of the crippled and sick cattle; that at various points between Yuma and Phoenix the train officials in charge of the shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of the cattle; that after arrival at Phoenix, one of the crippled animals remained in the defendant's car for more than a week; that from the unloading of the shipment at Phoenix until October 21st of that year the plaintiff and the agents of the defendant and its connecting carrier were almost daily in communication relative to the damages sustained by the plaintiff; that

ure and extent of the injuries cattle which arrived alive were ; to render it impossible to de- : the amount and extent there- ıin the 10-day period; that a : thereof died many days after rrival at Phoenix as the result ı injuries; and that the defen- ı many occasions prior to Oc- 21st recognized the plaintiff's o recover on account of his :s. There was proof tending ain all the facts so alleged in ly. We think, therefore, that ırt below committed no error ructing the jury that in view evidence, if they found it to , the plaintiff was relieved and d from giving notice within days. Cockrill v. Missouri, T. Ry. Co., 90 Kan. 650, 136 2, and cases there cited; Pier- Northern Pac. Ry. Co., 61 450, 112 Pac. 509; Chicago, R. '. Ry. Co. v. Spears, 31 Okl. 2 Pac. 228; Missouri, K. & T.). v. Frogley, 75 Kan. 440, 89 03; Adams v. Colorado & S.)., 49 Colo. 475, 113 Pac. 1010, R. A. (N. S.), 412."

ıre to give notice of damage very of other and inferior live instead of those consigned, five days of delivery, does not le recovery where notice was without delay on discovery of s. Chesapeake & O. Ry. Co. man & Clark (Va. 1916), 90 R. 631.

re, before accepting the ship- of stock at destination, ship- :quired agent of the terminal to note on the freight bill shipper received stock under on stock in bad shape account n and lack feed and water," :t of shipment requiring notice of claim within one day after delivery at destination, as condition precedent to right of recovery, was sufficiently complied with. I. C. R. Co. v. Rogers & Hurdle (Miss. 1917), 26 So. 686.

A carrier's stipulation, requiring written notice of claim for damage to stock shipment before animals are removed from place of destination or from the place of delivery and before animals are mingled with other animals, *held* reasonable and valid; consequently, a shipper's verbal notice to an agent of delivering carrier was insufficient. Bryan v. L. & N. R. Co. (N. C. 1917), 93 S. E. 750.

Written notice within the time stipulated of an intention to make a claim for damages, without specifying the amount of the damages claimed, is a sufficient compliance with a stipulation in the through bill of lading for an interstate shipment of peaches that the carrier issuing the bill shall not be held liable for damages unless a claim for damages is reported by the consignee in writing to the terminal carrier within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. St. L. I. M. & S. R. Co. v. Starbird, 37 Sup. Ct. 462; 243 U. S. 592; 61 L. ed. 917.

A shipper could not recover for injury to a furniture shipment where he failed to file required written notice of loss within specified time, although agent had actual knowledge of loss. Taft & Van Dyke v. A. C. L. R. Co. (N. C. 1917), 93 S. E. 752.

In an action against a carrier for damages to goods, the bill of lading requiring written statement of loss, the claimant must show by competent evidence not only that he delivered such statement, but the terms of the

livery or at the point of origin.[20] Where the agent of a delivering carrier was present at the removal of a shipment of mules from the car and saw their condition, which required immediate

statement itself. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

20. Strommer v. C. M. & St. P. Ry. Co. (S. D. 1917), 161 N. W. 346.

In Strommer v. C. M. & St. P. Ry. Co., 161 N W. 346, the court says, p. 347:

"We are of the view that this was a contract which the parties had the right to make in relation to interstate shipments; that the filing of a claim with an agent at another station than at the point of origin or destination is not in compliance with the contract; that an agent at one station has no authority to bind the company on account of business to be transacted at another station, unless specifically authorized so to do, or unless the act of such agent shall thereafter have bene ratified by the company. M., K. & T. Ry. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; McManus v. C. G. W. Ry., 156 Iowa, 359, 136 N. W. 769; M. K. & T. Ry. v. Lynn, 161 Pac. 1058."

Most live stock contracts carry a provision that notice of loss must be given to agent at destination. In many instances there is no such agent. So it has been held a provision in a live stock contract that notice of loss must be given to the nearest station agent of the carrier or its agent at destination before the stock is removed or mingled with other stock is unreasonable under the Interstate Commerce Act where it does not appear that the carrier had an agent at destination. Hovey v. Tankersley (Tex. 1915), 177 S. W. 153, 154.

However, it is held that it is the duty of the carrier to have an agent, and the burden of proof is on the carrier to show that it does maintain an agent on whom notice should be served, and who is reasonably accessible. Wall v. Northern Pac. Ry. Co. (Mont. 1914), 45 Pac. 291, 292.

But a notice to an agent of the delivering carrier was sufficient, it being made the agent of the initial line by federal law. Nor. Pac. Ry. v. Wall, 36 Sup. Ct. 493, 241 U. S. 287, 60 L. Ed.; C. R. I. & P. Ry. Co. v. Dalton (Tex. 1915), 177 S. W. 556.

However, it has been held that where a through bill of lading for an interstate shipment of horses over several lines required as a condition to recovery that notice of injuries should be given to the last carrier before removal, the fact that the agent of the last carrier knew of the injuries relieves the shipper of the necessity of giving such notice; the knowledge of the agent of the last carrier being imputable to the initial carrier. Washington Horse Exchange v. Louisville & N. R. Co. (N. C. 1916), 87 S. E. 941; C. R. I. & P. Ry. v. Linger (Tex 1913), 156 S. W. 298, 299.

Under a shipping contract stipulating that the shipper shall, as soon as he discovers any injury, promptly give written notice to the carrier's agent, before removing the stock and within one day after delivery, and that failure to give the notice shall bar recovery, the carrier had the bur-

, and which did not reveal the extent of their injury, and
ys after the delivery the agent of the delivering carrier
ed with written notice containing an itemized statement

›wing that the stipulation, particular shipment, was and, where there was no ıtion and proof, the ship- ›t required to prove notice ıse for not giving notice; fact that damages were the shipper, or that the ıd directed a commission › put in the claim, did not ith proof that there was an :ceive notice. C. R. & I. P. :on (Tex. 1915), 177 S. W.

a bill of lading required damages to be reported nsignee in writing to the carrier within 36 hours e of the arrival of the ship- pliance therewith was not / the fact that some agent e of the delivering carrier ies did not include the in- of such matters or the re- ›f to some agent in author- of the damaged condition ›ment, on arrival at desti- agent in authority know- he shipment was damaged claim for damages would St. L., I. M. & S. Ry. Co. (Ark. 1915), 177 S. W.

ı similar case it was held : peaches shipped under a ıng requiring notice of any › be given within 36 hours arrival of the shipment at ınation, were unloaded by 's employes at its dock and piles as unloaded; neither nee nor his representative being allowed on the dock until the cars were completely unloaded, and the consignee, upon discovering that the peaches were in a damaged condition, went to the dock foreman employed by the carrier, and who was in authority at the dock, and told him that the peaches were not iced and were in a bad condition, and the foreman examined the peaches without making any comment, this charged the carrier with notice that compensation would be claimed and excused compliance with the bill of lading; it not being necessary that the consignee should tell the foreman that it was his intention to sue for damages, as it was not required that the written notice should contain such statement. St. L., I. M. & S. Ry. Co. v. Starbird (Ark. 1915), 177 S. W. 912, 913.

Where a shipper consigned lumber to its own order, taking a bill of lading from the initial carrier stipulating against liability for failure to deliver unless notice was given withn four months after a reasonable time for delivery had elapsed, where such notice was given to the terminal carrier 4 months and 11 days after the misdelivery, but within 4 months after the shipper received actual notice of the misdelivery, the notcie was sufficient to hold the initial carrier, since the shipper could assume that the terminal carrier would not make an unauthorized delivery, and was not chargeable with notice of any misdelivery, so that the time for presenting the claim did not begin to run until the shipper had received actual

of the plaintiff's claim, there was a sufficient compliance, under the circumstances, with a stipulation in the contract of shipment that a notice of claim for damages be given in writing before removal of the stock and before it should be mingled with other stock.[21] There is not any special form in which the notice should

information of the misdelivery. St. L., I. M. & S. Ry. Co. v. Blisscock Oak Co. (Ark. 1915), 176 S. W. 325.

But since the Carmack Amendment makes it obligatory upon the initial carrier to issue a through bill of lading, the connecting carrier becomes the agent of the receiving carrier for the purpose of receiving the goods and delivering the property. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 196, 206, 55 L. Ed. 167, 178, 182, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 491, 56 L. Ed. 516, 253, 32 Sup. Ct. 205.

Therefore a provision in a bill of lading governing an interstate shipment of live stock that notice of loss must be given before the live stock is removed from the place of destination or mingled with other stock is complied with when such notice is given to the delivering carrier although such carrier is not the initial line. It is not necessary that notice be given to the initial line as any connecting carrier is its agent. Nor. P. R. Co. v. Wall, 36 Sup. Ct. Rep. 493, 496, 241 U. S. 87, 60 L. Ed. —; Overton v. C. R. I. & P. Ry. (Tex. Civ. App. 1913), 160 S. W. 111.

The theory of such a provision has been well settled.

In St. L. I. M. & S. R. Co. v. Starbird, 37 Sup. Ct. 462, the court said, p. 468:

"It is not difficult for the consignee to comply with a requirement of this kind, and give notice in writing to the agent of the delivering carrier. Such notice puts in permanent form the evidence of an intention to claim damages, and will serve to call the attention of the carrier to the condition of the freight, and enable it to make such investigation as the facts of the case require while there is opportunity so to do."

Where a shipment was routed over two roads and a loss occurred, notice to the initial carrier was sufficient notice of the claim for the loss. Gilkin & Edwards v. N. S. R. Co. (N. C. 1917), 93 S. E. 469.

21. Chicago, I. & L. Ry. Co. v. Priddy (Ind. 1917), 115 N. E. 266.

In a suit to recover damages for injury to a shipment of live stock the evidence and finding of facts both show that the agent of the delivering carrier was present, and assisted and gave directions in the removal of the mules, and saw that one of them was dead, and that the condition of the others was such that they needed to be immediately taken away and cared for. Their condition was such that claimants could not then know the extent of their injury. Seven days after the delivery of the mules at Huntington, to wit, on February 12, 1907, the agent of the delivering carrier was served with a written notice containing an itemized statement of the claim. *Held* this was a sufficient compliance with said stipulation in the light of the facts disclosed by

be given, but the person to whom it is given must be such an agent that notice to him may reasonably be considered notice to the company. Under a stipulation in a bill of lading that claims for damages must be made in writing to the carrier at the point of delivery or origin within four months after the delivery of the property, and that unless claims are so made the carrier would not be liable, the filing of such claim with the carrier receiving the goods from the boat to which they had been delivered by the shipper for an interstate shipment, and whose negligence had actually caused the damage, was a substantial compliance.[22]

3. **Waiver of Notice.** Prior to a recent decision in the Supreme Court of the United States many of the state courts had taken the view that the requirements in the bill of lading concerning the giving of notice might be waived by the carrier. It is now, however, the settled law that this provision cannot be waived. The rule has been laid down that the effect of a stipulation in a bill of lading for an interstate shipment requiring claims for damages or misdelivery to be presented within four months after a reasonable time for delivery has elapsed, cannot be avoided by suing the carrier in trover on the theory that in making the misdelivery it converted the shipment, and thus abandoned the contract, since the parties can not waive the terms of the contract under which the shipment was made pursuant to the Interstate Commerce Act. Nor could the carrier by its conduct give the shipper the right to ignore the terms and hold the

the evidence and finding. Louisville, etc. Co. v. Steele, supra; Ormsby v. Union Pac. R. Co. (C. C.), 4 Fed. 170; Kime v. Southern Ry. Co., 153 N. C. 398, 69 S. E. 264; Hinkle v. Railroad Co., 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; Western R. Co. v. Harwell, 97 Ala. 341, 11 South. 781; Harned v. Mo., etc. Co., 51 Mo. App. 482; Gulf, etc. Co. v. Stanley, 89 Tex. 42, 33 S. W. 109; Atchison, etc. v. Temple, 47 Kan. 7, 27, Pac. 98, 13 L. R. A. 362; Same v. Collins, 47 Kan. 11; Mo., etc. Co. v. Davis, 24 Okla. 677, 104 Pa. 34, 24 L. R. A. (N. S.) 866; Chicago, I. & L. Ry. Co. v. Priddy (Ind. 1917), 115 N. E. 266, 271.

22. Aydlett v. Norfolk-Southern R. Co. (N. C. 1916), 89 S. E. 1000.

Where a railroad, carrying household goods, lost them, and the shipper sued therefor before an order of the Interstate Commerce Commission permitting a waiver of the provision in the bill of lading concerning the giving of notice, was made, such order does not affect the case. Banaka v. Missouri Pac. Ry. Co. (Mo. 1916), 186 S. W. 7.

carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. So it has been held that a railroad by accepting and receiving a shipper's claim for loss of the shipment after the four months for making claim stipulated in the written bill of lading has elapsed by declining to pay on other grounds than want of notice, cannot waive the requirement of notice in four months, since such proceeding would violate the federal Interstate Commerce Act, forbidding all devices by which discrimination between shippers may be accomplished.[23] However the filing of a suit is compliance with the provisions in a bill of lading that notice of loss must be given within a certain time.[23½] While for a long time it was thought that there might have been conditions under which a carrier could waive a provision in the bill of lading under which it was specified that the time limit for presenting a claim could be waived, it is now well settled by the Supreme Court of the United States that this may not be done. Lawful provisions in the bill of lading have the effect of a law from which neither carrier nor shipper may deviate.[24] This principle is strengthened

23. Banaka v. Missouri Pac. Ry. Co. (Mo. 1916), 186 S. W. 7.

23½ M. K. & T. Ry. of Tex. v. Neale (Tex. 1915), 176 S. E. 65.

24. The overwhelming weight of authority is to the effect that a carrier cannot waive provision in its bill of lading that notice of claim, or the claim itself, must be presented within a specified time.

C. & A. Ry. v. Kirby, 225 U. S. 155; 32 Sup Ct. 648; 56 L. Ed. 1033 Ann. Cas. 1914A, 501.

Kansas Southern Ry. v. Carl, 227 U. S. 639, 654; 33 Sup. Ct. 391, 396, 50 L. Ed. 683.

Phillips v. Grand Trunk Ry. 236 U. S. 662; 35 Sup. Ct. 444; 59 L. Ed. 774.

Southern Ry. v. Prescott, 240 U. S. 632; 36 Sup. Ct. 469; 60 L. Ed. 905.

Northern Pac. R. Co. v. Wall, 241 U. S. 87; 36 Sup. Ct. 493; 60 L. Ed. 905.

Georgia S. & A. R. R. v. Blish Milling Co., 36 Sup. Ct.; 241 U. S. 190; 60 L. Ed.

Cincinnati, etc. R. Co. v. Rankin, 241 U. S. 319; 36 Sup. Ct. 555; 60 L. Ed. 1022.

A. T. & S. F. R. Co. v. Harold, 241 U. S. 371; 36 Sup. Ct. 665; 60 L. Ed. 1050.

Chesapeake & Ohio Ry. Co. v. McLaughlin, 242 U. S. 142; 37 Sup. Ct. 40; 61 L. Ed.

Clegg v. St. L. & S. F. Ry. Co., 203 Fed. 971; 122 C. C. A. 273.

Kidwell v. Oregon Short Line R. Co., 208 Fed. 1 (125 C. C. A. 313).

Olson v. C. B. & Q. R. R., 250 Fed. 372.

by the fact that the Cummins Amendment permits carriers to provide notice of claim must be given within ninety days, and claims filed within four months, and suits instituted within two years. The uniform bill of lading provides that notice of loss must be given within four months and claims filed within six

Atchison Co. v. Baldwin, 53 Colo. 416; 128 Pac. 449.

A. T. & S. F. Ry. Co. v. Miller (Colo. 1917), 163 Pac. 836.

Colo. & S. Ry. Co. v. Blunck (Colo. 1917), 163 Pac. 840, 841.

Railroad Co. v. Kirkham, 63 Kan. 255 (65 Pac. 261).

Ray v. M. K. & T. Ry. Co., 96 Kan. 8; 149 Pac. 397; L. R. A. 1916D, 1046.

Easdale v. A. T. & S. F. Ry. Co. (Kan. 1917) 164 Pac. 164.

Abel v. A. T. & S. F. Ry. Co. (Kan. 1917) 164 Pac. 269.

L. & N. R. Co. v. Johnson (Ky. 1918), 206 S. W. 638.

Metz v. Boston & M. R. R. (Mass. 1917) 116 N. E. 475.

Fletcher v. N. Y. C. & H. R. R. Co. (Mass. 1918) 188 N. E. 294.

Kemper Mill Co. v. M. P. Ry. Co., 193 Mo. App. 466; 186 S. W. 8.

Donoho v. Misouri Ry. Co., 193 Mo. App. 610; 187 S. W. 141.

Banaka v. M. P. Ry. (Mo. 1916), 186 S. W. 7.

Johnson v. Missouri Pac. Ry. Co. (Mo. 1916) 187 S. W. 282.

Equity Elevator Co. v. Union Pac. Ry. Co. (Mo. 1917), 191 S. W. 1067.

Harelson v. St. L. S. F. R. R. Co. (Mo. 1917), 191 S. W. 1068, 1069, 1070.

Barton v. L. & N. R. Co. (Mo. 1917), 96 S. W. 379.

Cudahy Packing Co. v. C. & N. W. Ry. Co. (Mo. 1918), 201 S. W. 596.

Cudahy Packing Co. v. Bixby (Mo. 1918), 205 S. W. 865.

Wall v. Northern Pac. Ry. (Mont. 1916), 161 Pac. 518.

Meyers v. Cleveland C. C. & St. L. R. Co., 171 N. Y. S. 71.

Bryan v. L. & N. R. Co. (N. C. 1917), 93 S. E. 750.

St. L. & S. F. Ry. Co. v. Bilby, 35 Okla. 589; 130 Pac. 1089.

C. R. I. & P. Ry. Co. v. Brightwell, (Okla. 1917), 162 Pac. 484.

C. R. I. & P. Ry. Co. v. Parsons (Okla. 1917) 162 Pac. 955.

C. R. I. & P. Ry. Co. v. Gray (Okla. 1917), 165 Pac. 157.

St. L. & S. F. R. Co. v. Sparks (Okla. 1918), 178 Pac. 90.

St. L. & F. R. Co. v. Ladd (Okla. 1918), 178 Pac. 125.

Dean v. Southern Ry. Co. (S. C. 1917), 91 S. E. 1042.

Murray v. A. C. L. R. Co. (S. C. 1917), 93 S. E. 387.

St. L. etc. Ry. Co. v. Overton (Tex. Civ. App.) 178 S. W. 814.

Houston E. & W. Ry. Co. v. Houston Packing Co. (Tex. 1918), 203 S. W. 1140.

Mexico Northern Ry. Co. v. Williams (Tex. 1919), 208 S. W. 712.

Baird v. D. & R. G. R. Co. (Utah 1916), 162 Pac. 79.

In Banka v. Missouri Pac. Ry. Co. (Mo. 1916), 186 S. W. 7, the court said, p. 8:

"The Federal Commerce Act is designed to prevent discrimination between shippers, and its object is

months. These provisions are authorized by the Cummins Amendment. They are valid and cannot be waived by the carrier. It might not be amiss here to note that under federal control it has developed that some of the eastern carriers have been paying loss and damage claims where liability is clear, although

to nullify any device whereby the carrier may practice favoritism between them. In deciding that a carrier could not waive a limitation in regard to the time in which a suit for certain overcharges should be brought, the Supreme Court of the United States said that:

" 'To permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate, not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier.' Phillips v. Grand Trunk Ry., 236 U. S. 662, 667, 35 Sup. Ct. 444, 446 (59 L. Ed. 774). Under this rule of equality we think a carrier cannot say to one shipper, I will enforce the burdensome terms of our contract requiring notice in a specified time, and to another, I will release you from the same provisions in the same character of contract. We do not say that a situation might not exist whereby a shipper would be relieved of the necessity of giving notice of loss, but we do say that a carrier may not, by his voluntary act, release one and hold the other."

A carrier which has delivered a shipment under an order notify bill of lading without requiring the surrender of such bill of lading is not liable if the claim is not filed within four months as required by the bill of lading. Equity Elevator Co. v. Union Pac. R. Co. (Mo. 1917), 191 S. W. 1067, 1068.

In such a case, althought the claimant contended he delivered the statement, he could not show its terms by parol testimony. Erisman v. C. B. & Q. R. Co. (Ia. 1917), 163 N. W. 627.

But where a bill of lading provides that a claimant must give written notice of any loss or injury within one day after the same has been discovered and file notice of claim within ninety days, compliance with the first provision does not excuse compliance with the second, even though the first notice is given, notice of claim must also be filed. Chicago, R. I. & R. Ry. Co. v. McElreath (Okla 1918), 169 Pac. 628.

Some state courts have held the contrary, however.

Bush v. Curry (Ark. 1917), 199 S. W. 375.

Wells Fargo & Co. Express v. Townshend & Freeman Co. (Ark. 1918), 204 S. W. 417.

Bliss v. Southern Pac. Co. (Cal. 1918), 172 Pac. 760.

Adams v. Colorado & Southern Ry. Co. 49 Colo. 475 (113 Pac. 1010), 36 L. R. A. (N. S.) 412.

Hudson v. Northern Pac. Ry. Co. 92 Iowa, 231; 54 A. M. (S. T.) 550.

such claims are more than two years old. While it is possible that carriers under federal control, that is a carrier operated by the Government, may not be held to as strict an adherence to the statute as a carrier privately operated would be, it is very clear that on the part of a privately operated carrier such a proceeding would be distinctly unlawful.

A. T. & S. F. Ry. Co. v. Wright, 78 Kan. 94; 95 Pac. 1132.

B. & O. R. Co. v. Leach (Ky. 1917), 191 S. W. 310.

B. & O. R. Co. v. Leach (Ky. 1917), 191 S. W. 310.

Howard & Callahan v. I. C. Ry. Co., 161 Ky. 783; 171 S. W. 442.

C. N. O. & T. P. Ry. Co. v. Smith & Johnston, 165 Ky. 235; 176 S. W. 1013.

Ithaca Roller Mills v. A. A. R. Co. (Mich. 1917), 163 N. W. 934.

Boyd v. King (Mich. 1918), 167 N. W. 901.

Lasky v. Southern Express Co., 92 Miss. 268; 45 South. 869.

N. O. & N. E. R. Co. v. Wood (Miss. 1917), 73 So. 615.

I. C. R. R. v. Bauer (Miss. 1917), 75 So. 376.

Bernstein v. Y. & M. V. R. Co. (Miss. 1918), 77 So. 146.

O'Briant v. Pryor (Mo. 1917), 195 S. W. 759.

Hinkle v. Southern Ry. Co., 126 N. C. 932 (36 S. E. 348; 78 Am. Rep. 685).

Reynolds v. Adams Express Co. (N. C. 1916), 90 S. E. R. 510.

St. L. & S. F. R. R. Co. v. James, 36 Okla. 196; 128 Pac. 279.

A. T. & S. F. Ry. Co. v. Robinson, 36 Okla. 435; 129 Pac. 20.

St. L. I. M. & S Ry. Co. v. Patterson (Okla. 1918), 177 Pac. 898.

Gilliland v. Southern Ry. Co., 85 S. C. (67 S. E. 20); 27 L. R. A. (N. S.) 1106 (137 Am. St. Rep. 861).

These decisions should not be regarded as of any weight where interstate shipments are concerned.

VIII.

DAMAGES RECOVERABLE.

1. Limitation of Liability in General.
2. The Cummins Amendment.
3. Provisions in Bill of Lading.
4. Claims Arising Prior to June 2, 1915.
5. Measure of Damages Under Exchange Bill of Lading.
6. Delay in Transit.
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1. **Limitation of Liability in General.** For many years, if not, indeed, from the origin of railroad transportation in this country, common carriers by railroad have sought, by provisions in shipping contracts, bills of lading, tariff publications, etc., to limit their common-law liability, not only as insurers against loss or damage to property received by them for transportation, but also as tort-feasors for loss or damage caused by their negligence. One method was by a so-called release, executed by the shipper, and intended to be effective whether the loss or damage was was due to the negligence of the carrier or to other causes. The courts in different jurisdictions have differed as to the validity of such limitations and they have been the subject of

legislation in some of the states. By adoption of the "Carmack Amendment," so called, to the act to regulate commerce, approved June 29, 1906, Congress provided that a common carrier receiving property for transportation from a point in one state to a point in another state should issue a receipt or bill of lading therefor and be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier to which such property might be delivered, or over whose lines such property might pass, and declared that no contract, receipt, rule, or regulation should exempt such common carrier from the liability thereby imposed. It was provided that nothing in that amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had at that time under existing law. Since that time, beginning in 1913, with Adams Express Co. v. Croninger, 226 U. S. 491, the Supreme Court of the United States has decided in a number of cases, all of which followed Hart v. P. R. R., 112 U. S. 331, that where the shipper has his choice of two rates, the higher carrying unlimited carrier's liability, and in "a fair, just, and reasonable agreement" declares or agrees that the value of his shipment is a certain sum and thereby secures a reduced transportation rate, he is bound by that declaration or agreement, estopped from claiming or recovering more than that value in case of loss of or damage to the property, and conclusively presumed to have known the governing tariff. It is therefore very important in the determination of loss and damage claims to ascertain the date of the liability of a carrier. It is well settled by decisions of the Supreme Court of the United States that prior to the passage of the Cummins Amendment, effective June 2, 1915, that an agreed or restricted valuation in a bill of lading based on a lower rate was valid.½ Therefore where a

½. C. B. & Q. Ry. v. Latta, 33 Sup. Ct., 155, 226 U. S. 519; George N. Pierce v. Wells, Fargo & Co., 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. Rep. 351, 353; K. C. S. Ry. Co. v. Carl, 33 Sup. Ct. 391, 395, 227 U. S. 639; H. K. & T. R. R. v. Harriman Bros., 33 Sup. Ct. 397, 401, 227 U. S. 657; C. N. O. & P. Ry. Co. v. Rankin, 36 Sup. Ct. 555, 241. U S. 319; Georgia F. & A. Ry. Co. v. Blish Milling Co., 36 Sup. Ct. 521; Atchison, T. & S. F. R. Co. v. Harold, 36 Sup. Ct. 665, 668; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; Am. Exp. Co. v. U. S. Horse Shoe Co. 37 Sup. Ct. 595;

shipper tendered to a carrier a shipment of automobiles worth $20,000 which was shipped under a released value of $50 and such shipment was injured, he could not recover more than $50.[½a] But this principle applies only to claims that arose before June 2, 1915, as has been pointed out. No restriction of liability of any kind whatever was valid between June 2, 1915, and August 9, 1916, except as to goods hidden from view and concerning which the carrier had been authorized by the Interstate Commerce Commission to make rates dependent upon value. On claims that arose since August 9, 1916, however, the claimant is bound by a restriction of liability where the Interstate Commerce Commission has expressly authorized the carrier to establish released rates and limitations of liability. However, the fact that such tariff has been filed with the Commission and that it goes into effect, does not signify that it is approved. The law provides that the carrier may file a tariff charging a rate upon thirty days' notice to the public. It is the duty of the Commission to receive and file such tariffs. While the interstate Commerce Commission has power to suspend such a tariff it, of course, will only do so where the injustice of the tariff is brought to its attention by express objections. It is very evident that if there are no objections it is only in very exceptional cases that the Commission of its own motion will suspend the tariff. So the mere fact that the tariff is allowed to become effective cannot

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Gas. 1915D, 593; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L.R.A. 1915E, 665, P. U. R. 1915C, 300 35 Sup. Ct. Rep. 494; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A. 1917A, 265, 36 Sup. Ct. Rep. 555; New York C. & H. R. R. Co. v. Beaham, 242 U. S. 148, ante, 43, 37 Sup. Ct. Rep. 43; Boston & M. R. R. v. Piper, 38 Sup. Ct. 354.

½a. Pierce v. Wells Fargo, 236 U. S. 278, 35 Sup. Ct. 351.

ısidered as the "express" authority from the Commission :he Cummins Amendment contemplates. As has been :d out, the Commission has, in a number of cases, signified anner in which this "express" authority may be obtained. s a petition has been filed with the Commission and the ıs order obtained from the Commission, such tariff does gally restrict liability except in those cases where it has iled as the result of an order by the Commission entered in hearing where the question of such released rates was ed.

The Cummins Amendment. Up to very recently there een a good deal of confusion as to what was the proper ıre of damages recoverable where a shipment was lost or d. Originally the bill of lading provided that the amount of ss or damage for which any carrier is liable should be com- on the basis of the value of the property (being the bona fide e price, if any, to the consignee, including the freight charges)aid) at the place and time of shipment. In the application of ıle, however, a great deal of difficulty was experienced. In t many cases suits were decided without reference to the pro- ; of the bill of lading. Then it was found difficult to apply this ion to cases of delay or cases where there was no market for the goods. Then again, there was some doubt as to er section 3 was valid. While it is true that the carrier ent years have pretty generally insisted upon the applica- of section 3, it must be admitted that the shippers have felt this provision was valid and binding after the passage : Cummins Amendment. The original Cummins Amend- was approved March 4, 1915, and was effective June 2, This provided that a carrier was liable "for the full actual lamage, or injury" to a shipment caused by it, or by a con- g carrier, "notwithstanding any limitation of liability or tion of the amount of recovery or representation or agree- as to value in any such receipt or bill of lading, or in any ıct, rule, regulation, or in any tariff filed with the Interstate ıerce Commission; and any such limitation, without respect manner or form in which it is sought to be made is hereby ed to be unlawful and void. Provided, however, that if the

goods are hidden from view by wrapping, boxing, or other means and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules." It will immediately be appreciated that this law invalidated the entire system of released rates. The only case in which released rates were permitted was where the goods were hidden from view and the carrier had been authorized by the Interstate Commerce Commission to establish rates dependent upon value. After this law became effective it was seen that a mistake had been made. The carriers contended that if they were to be subjected to unlimited liability their rates should be increased 10%. The Interstate Commerce Commission recommended to Congress that the law be changed so as to validate released rates in cases where the Commission authorized them. Thereupon the second Cummins Amendment was passed, effective August 9, 1916, and this law provided as follows: "That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one

State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void. Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of Section 10 of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or

agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses. Provided, however, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessless or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." Perhaps it might not be amiss to analyze this law phrase by phrase and put in tabulated form the exact liability which is imposed. (1) Every common carrier receiving property for transportation between interstate points or from a point in a state to a point in an adjacent foreign country must issue a receipt or bill of lading therefor. (2) Every such common carrier is liable to the holder of the bill of lading for any injury caused to the property by any other carrier over whose lines the property passes, either within the United States or within an adjacent foreign country. Now, there is one limitation to this. In order to make the carrier so liable the shipment must be transported on a through bill of lading. It will be noted that in the preceding clause it is provided that the carrier is obligated to issue the through bill of lading. Now, when the through bill of lading is issued the carrier is liable for any injury that is occasioned anywhere, but it must be noted, particularly with reference to injury which occurs in an adjacent foreign country, that the law only makes the carrier liable for such injury when the carrier has received "property for transportation from a point in one state * * * to a point in another state * * * or

from any point in the United States to a point in an adjacent foreign country. * * *" This language taken in connection with that following, confirms the intention that the initial carrier is to be liable for any damage caused to the property anywhere, under the conditions above stated. But the question arises, if property is accepted for transportation, say from Minneapolis to Albuquerque, N. M., and there reconsigned to a point in Mexico, and damaged in Mexico, is the initial carrier liable in such an instance? This situation brings us squarely to the question as to whether the Act is designed to cover this contingency. It is, of course, a very common practice to consign freight to some junction point or some jobber's market and there reconsign it to an ultimate destination and very frequently an exchange bill of lading is issued at such intermediate points. An exchange bill of lading is a new bill of lading for the shipment and the old one is taken up. Considerable controversy has arisen as to whether, in a case of this kind, the original initial carrier, in the event that a loss was caused by the last connecting carrier at the ultimate destination, is responsible. In other words, which is the initial carrier? Is it the carrier that first received the shipment, or is it the carrier that issued the exchange bill of lading. The Supreme Court of the United States has recently ruled that such transportation must be considered as a through transportation and the initial carrier is the first carrier receiving the property.[1] Some doubt, however, may well be expressed as to whether this would apply to a shipment made to a foreign country, that is, an adjacent foreign country, such as Mexico and Canada. The case decided by the Supreme Court of the United States, it will be noted, was strictly a shipment between the states, but it might be that a distinction would be made in a shipment going outside of the country. (3) "No contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed, * * * ." It will be seen, therefore, that the liability of the initial carrier is absolute and fixed. The language is plain, not ambiguous. There is no room for construction, there is no way by which the initial carrier can evade

1. A. T. S. F. Ry. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665.

the liability hereby imposed. (4) A common carrier is liable "to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon," whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier * * * to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country, when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is supposed to be made, is hereby declared to be unlawful and void." The following points are extremely important: (a) The liability imposed exists whether the bill of lading has been issued or not; in other words, the owner of the property can always recover, no matter whether through negligence, mistake, or for any other reason a bill of lading has not been issued. (b) Recovery can be had for the "full actual loss, damage, or injury to such property * * *." Supposing wheat is shipped from Minneapolis to New York and it is selling for $1.50 a bushel, when shipped from Minneapolis, and is invoiced to the consignee in New York at $1.50 a bushel; it is injured in transit, through a leaky roof or for some other reason and when it arrives in New York wheat has jumped to $2.00 a bushel. Section 3 of the old Uniform Bill of Lading restricts liability to the invoice price to the consignee at the time and place of shipment. It is very obvious that under this language such limitation is void and that the liability imposed is for the full actual loss at the time it arrives, or if delayed, at the time it should have arrived. In the hypothetical case referred to it would be $2.00 a bushel. Of course, the rule works the other way. Supposing it is invoiced to the consignee at $1.50 a bushel and is damaged; when it arrives wheat has gone down to $1.00 a bushel; $1.00 a bushel, then would be all that the carrier would be liable for. (c) Any limitation of the absolute rule that recovery can be had for the full actual loss is void. In other words, this provision has rendered absolutely nugatory

all the previous limitations of liability carried in the various tariffs. So the limitation restricting household goods, for instance, to a certain value per pound, or per hundred pounds, in consideration of a released rate, is absolutely void. However, it must be remembered that there is an exception to this liability created by the Amendment of August 9th. What is quoted is the exact language of the law as originally passed. It is strict in effect, but it has been modified by the Amendment of August 9th, and it is this Amendment which we will now proceed to consider. (5) The Amendment of August 9th recognized that under the original Cummins Amendment any limitation of liability whatsoever was void, that is, it recognizes that Section 3 of the Uniform Bill of Lading and the whole system of released rates to be contrary to the Cummins Amendment, because the language of it is as follows: "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability, or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to value, be held to be a violation of Section 10 of this Act to regulate commerce, as amended; * * *" The Amendment refers to the provisions affecting liability "for full actual loss" and declares any such limitation to be unlawful and void. But it seeks to limit these provisions denying to the carriers a right to limit their liability, by exempting from the law baggage carried on passenger trains, or boats. Then it goes on to provide that the Cummins Amendment, so far as it abrogates the right to limit liability, shall not apply to trains or boats carrying passengers. It is somewhat

ambiguous in this respect as to whether the Cummins Amendment, as an entirety, is not to be applied to trains or boats carrying passengers at all, or whether it is simply applicable to baggage. (d) The abrogation of the right to limit liability does not apply to any commodity accepted for transportation concerning which the Interstate Commerce Commission has permitted the carrier to establish released rates. Now, it is an important thing to know that the mere filing of a released rate tariff with the Interstate Commerce Commission does not permit the carrier to limit liability. Before the released rates are effective, they must be approved by the Interstate Commerce Commission. This is borne out by the following language of the Amendment: "Any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation." The exception, it will be seen, applies to "property, * * * received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value * * *." The words used are "expressly authorized." Now, of course, these words are construed in their usual meaning and the words "expressly authorized" mean specific authority, not inferential authority. Now, in a certain sense, tariffs which are filed and published as required by law, are considered, to use a loose phrase employed by many state courts as "approved by the Commission," but such tariffs are not approved by the Commission, as a matter of fact nor is there any license for a statement of this kind. If the carriers' tariffs conform to the requirements of the Interstate Commerce Act and the regulation of the Commission, the Commission must receive them and tariffs filed with the Commission and which comply with the law and its regulations, contain the legal rate, and such rates, once they are filed are automatically in effect irrespective of any action by the Commission; unless the Commission ex-

pressly condemns them; that is, the mere filing of the tariffs themselves put the rates contained therein in effect. The only way they cannot be put in effect is by a suspension order of the Commission. Now, such tariffs, of course, in a loose manner of expression, may be considered as inferentially approved by the Commission because if the Commission did not, inferentially, at least, approve them, it doubtless would suspend them, but the mere filing cannot be considered as a requirement with this section. The law requires that the released rate shall be "expressly" authorized by the Commission. Furthermore, the law requires that any tariff schedule which may be filed with the Commission "pursuant to such order" must contain specific reference thereto and "may establish rates varying with the value so declared or agreed upon." Then the law goes on to state "the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with the declared or agreed value would, in its opinion, be just and reasonable under the circumstances and conidtions surrounding the transportation." It will be seen that the only way that released rates are valid is by express approval of the Interstate Commerce Commission. The mere fact that the Commission allows it to go into effect is not such approval. In this connection it might not be amiss to state that the Commission has prescribed a procedure to be followed in the case of released rates.[2] It will be furthermore noted that even the Interstate

2. The following is an important order of the Interstate Commerce Commission on the legality of released rates (April 26, 1918)

"IN THE MATTER OF RATES DEPENDENT UPON THE DECLARED OR RELEASED VALUE OF PROPERTY.

The only purpose in publishing rates dependent upon the declared or released value of the property transported is to limit the carrier's liability in case of loss or damage to the property. By amendment to section 20 of the act to regulate commerce approved March 4, 1915, "any such limitation to be made" was declared to be unlawful and void. It was without respect to the manner or form in which it is sought provided, however, that under certain conditions the Commission might establish and maintain rates dependent upon the value of the property as stated in writing by the shipper.

In the Cummins Amendment, 33 I. C. C., 682, decided May 7, 1915, the Commission said: "Neither bills of lading or other contracts for carriage or classifications or rate schedules of the carriers should contain

Commerce Commission cannot authorize a released rate on live stock but such stock must be carried at unlimited liability. Under the Cummins Amendment before it was amended there was some question as to the right of a shipper to declare a value on a shipment, less than the actual value. The Interstate Commerce Act makes it a criminal offense to misbill a shipment. It was thought that if a value of $5.00, for instance, was declared on an automobile, worth $1,000.00, it would be a violation of the criminal provisions of the Interstate Commerce Act. Therefore the following language is put in the new Amendment—to the effect that any declaration or agreement of value "shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not

any provisions which are so declared to be unlawful and void."

Effective August 9, 1916, that part of Section 20 of the act which authorized the Commission to establish and maintain rates based upon declared value was amended and the provision that any attempt to limit the carrier's liability should be unlawful and void was modified so it should not apply to baggage or to property other than ordinary live stock, "concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property."

In express Rates, Practices, Accounts, and Revenues, 43 I. C. C. 510 decided April 2, 1917, the Commission said: "We cannot, in view of the provisions of the law, authorize or sanction such rates upon ordinary live stock; neither can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission."

This decision was followed in Live Stock Classification, 47 I. C. C., 335, and again in Williams Co. v. Hartford and New York Transportation Co., 48 I. C. C. 269, in which the Commission held that the rates complained of which were dependent upon the value of the property, and which the carriers had not been authorized by order of the Commission to maintain, were unlawful.

Some carriers have neglected to secure from the Commission authority to maintain such rates or to cancel them from their tariffs. Unnecessary controversies arise as to the charges on property transported thereunder. It is clearly the duty of every carrier to secure from the Commission authority for the maintenance of such rates or to eliminate them from its classification and rate schedules. The Commission expects that each carrier will give this matter prompt and careful attention."

In its Released Rate Order No. 4 of May 12, 1918, the Interstate Commerce Commission prescribed the procedure to be followed to secure approval from the Commission of a released rate.

so far as relates to values be held to be a violation of Section 10 of this Act to Regulate Commerce, as amended; * * *" (6) The following language of the Amendment is very significant and extremely important, "Provided, further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing laws: * * *." It has been earnestly contended that this provision still leaves in effect the state decisions governing the collection of loss and damage claims, but this view of the section is now gradually being displaced by the rule that the federal decisions must govern. For instance, it was perhaps the almost unbroken weight of authority in the state courts that while the carrier was released from liability for a loss occasioned by an act of God, yet, if its negligence commingled with that of the act of God it would be held liable. A much stricter rule, however, had applied in the Federal courts. In the Federal courts it was said that if the carrier's negligence commingles with the act of God the carrier is not liable if his negligence contributes in only a remote degree to the injury. There can very easily be imaginer cases where a carrier would be held liable under state decisions and not liable under federal decisions. It was originally considered that the language referred to in this section left in effect all state decisions in a case of this kind. If the action was brought in a state court, it would naturally follow the line of decisions of that state. The weight of authority at the present time seems to be that all questions as to an interstate carrier's liability must be determined wholly with reference to the federal law. Thus, in the case presented, where a carrier might be liable under the state decisions but not liable under the federal authorities, the state court must follow the federal decisions. The language of this section, therefore, must be construed to refer to the character of the remedy, which might be brought against the carrier. That is; it preserves the right of the state court to hear and determine cases of loss or injury to freight caused by interstate carriers. These suits do not have to be brought in the federal courts, but may be brought in the state courts and in such state courts in any form of action which the state law allows. For instance, replevin, trover, conversion, tort, contract, and in fact, any action that is authorized by the state law. But in such

action the federal decisions must be followed in determining the right of recovery. In the adjudication of claims for loss and damage it should therefore be borne in mind that between June 2, 1915, and August 9, 1916, all limitations of liability were abrogated by the federal law and that for loss and damage to a shipment during that period the carriers are responsible, if they have caused it, for the full actual loss. With respect to injuries that occurred after August 9, 1916, the carriers are still liable for the full actual loss, except in those cases where the Commission have authorized carriers to maintain rates dependent upon value and under which they had limited their liability.

3. **Provisions in Bill of Lading.** In spite of the passage of the Cummins Amendment the carriers still use the same form of bill of lading that they have theretofore. The measure of damages for which they are liable was specified in Section 3 thereof and this provides as follows: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid." This is the same as the bill of lading that previously had been used, except in that bill of lading it defined the value of the property at the time and place of shipment as the invoice price to the consignee. In settling claims under this bill of lading the carriers generally give it such construction, and refuse to settle claims on any other basis than the invoice price to the consignee at the time and place of shipment. This measure of damages is, of course, a purely arbitrary one, and in effect constitutes a limitation of liability. The author pointed out in the Loss and Damage Review, Vol. 1, No. 1, pp. 115, 116, et seq., in the early part of 1917, that this provision necessarily must be void under the Cummins Amendment. There was unfortunately no judicial construction of it for two years after that until the question came before Judge Page Morris of the District Court of Minnesota. In the case before Judge Morris this was the only question presented and Judge Morris passed upon it in an exceptionally well reasoned and logical opinion. He held that the actual value at destination was the real test and stated (McCaull-Dinsmore Co. v. C. M. & St. P. Ry. Co., 252 Fed. 664): "The sole question in this case is whether the loss to the shipper

is to be measured by the value of the property at the place of destination at the time it should have been delivered, or by the value of the property at the time and place of shipment. And the decision of this question must depend upon whether or not the provision or stipulation in the bill of lading issued by the carrier and accepted and agreed to by the shipper, that the loss should be measured by the value at the time and place of shipment and settled on that basis, was valid under the Cummins Amendment of March 4, 1915, to the Interstate Commerce Act, which was the law in force at the time of the shipment and of the loss. The amendment was passed after the decisions of the Supreme Court on the Carmack Amendment cited by counsel had been rendered, and it is apparent from its language that its proposal and enactment were caused by these decisions and that it was aimed directly at them. Viewed in the light of those decisions and the purpose evidently sought to be accomplished, it is difficult to see how its language could be more sweeping. 'Shall be liable * * * for the *actual loss* * * * caused by it * * * notwithstanding *any limitation* (the italics are mine) of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, and any such limitation without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void.' This is the language of the amendment so far as it touches this case. The first proviso indicates the cases, of which this is not one, and the only cases, excepted from that language, and the only way in such cases of avoiding its terms, and thus emphasizes, and, if that were possible, makes more sweeping those terms. I do not see that it can make any difference under the language quoted that this bill of lading was provided for in the schedule of rates filed with the Commission, and that that schedule of rates also provided another bill of lading under which, if issued and accepted, the rate would have been higher. Under this language is the provision or stipulation above referred to in the bill of lading unlawful and void? If it is an agreement as to value, which I think it is not, it is clearly so. The answer to the question must therefore be found in the answer to the further ques-

tion, was this a limitation of the liability of the carrier or a limitation of the amount of the recovery? And it seems to me the answer to this questiton is found in the answer to the following question, what would have been the liability of the carrier, and the consequent amount of recovery, if that provision or stipulation had not been in the bill of lading? In the latter case there can be no question, and it was so admitted on the argument, as it had to be, but that the liability and the consequent amount of the recovery would have been that of the common law, namely, the value of the goods at the point of destination at the time they should have been delivered. And that this is the actual loss to the shipper caused by the failure of the carrier to deliver the goods at that time and place, whether the value is greater or less than at the time and place of shipment, is the foundation of the common-law rule. From the foregoing simple statement, I do not see how it is possible to escape the conclsion, upon a fair and open-minded consideration of the language of the amendment and the obvious and well known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and the amount of recoverment and is therefore unlawful and void. In reaching this conclusion I have not failed to consider the very able argument of counsel for defendant and also what has been said by the Interstate Commerce Commission, and it is with regret and not a little misgiving that I find myself in difference with men so able and experienced in such matter. But consider the matter as I may, I am always irresistibly brought back to this simple statement and to the necessary conclusion therefrom. I cannot see that there could be any greater difficulty after loss has occurred in ascertaining and proving the value at the time and place of delivery or destination than in ascertaining and proving the value at the time and place of shipment. If it be true, as suggested in the argument and by the Commission, as I think it may be, that the conclusion which I have reached will result in difficulties and confusion in existing rules and regulations and schedules and in some cases under these regulations and schedules in hardships and injustice to the carriers and possibly in some discrimination amongst shippers, the remedy will be found in facing the law, whose language, as it seems to me, is

too plain for construction or evasion, squarely, and revising and reconstructing those rules and regulations to meet it." Unfortunately, however, the Federal Director of Railroads did not see fit to follow this rule, but entirely ignored it in his circulars of instruction as to the method of computing loss and damage claims. The next decision on this question was also of great importance. For several years the Interstate Commerce Commission had been conducting a bill of lading investigation with a view of prescribing a new form of bill of lading. This the Commission had never done before. In 1908 the Commission had recommended that certain forms of bill of lading be adopted, but it did not order them in. Being convinced that it had jurisdiction, in 1919 it issued its report In the Matter of Bills of Lading, 52 I. C. C. 671, and prescribed the bill of lading that it was compulsory on the part of the interstate carriers to use. It discussed in great detail the validity of Section 3 of the bill of lading, quoted at length Judge Morris' opinion, and agreed with him that under the Cummins Amendment, Section 3 of the old bill of lading was invalid, and that the only legal measure of damages is one that is based upon the actual value of the shipment at destination.[3] While it must be admitted that until the

3. In the matter of Bills of Lading, 52 I. C. C. 671, the Commission said, p. 708:

"Section 2, clause 3, measure of carrier's liability for loss or damage. —In the uniform bill of lading approved by the Commission in its report In the Matter of Bills of Lading, *supra,* there was contained the following provision, which then constituted paragraph 2 of section 3 of the conditions:

'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.' One of the questions considered by the Commission in its report in The Cummins Amendment, *supra,* was thus stated: 'May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?'

Upon this question the Commission said:

'It is urged that this rule would relieve the question of the amount of

Supreme Court of the United States has spoken the ques
cannot be definitely determined as to the validity of this
tion, it is submitted that the reasoning of Judge Morris and
Commission, in construing the Cummins Amendment is so c
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act must be upheld.

liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations. The Cummins amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.'

"Upon brief in the instant case the carriers say:

"The carriers thereupon assumed that they were entitled to provide that liability should be determ with respect to the value of the p erty at the place and time of ment, and the uniform bill of la was amended so as to read amount of any loss or dama which any carrier is liable sh computed on the basis of the of the property at the pla time of shipment under this lading, including the freight ch if paid.' The carriers now pr as clause 3 of section 2 of th posed conditions, the foll amended provision:

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The shippers object to this posed language and propose the lowing:

'The amount of any loss or d age to property, or loss or dam due to delay in the delivery the under this bill of lading for w the carrier is liable by law, sha the full actual loss, damage, or jury, including freight charge paid.' While the rigor of the

4. Claims Arising Prior to June 2, 1915. As has been stated, all released rates are invalid under the Cummins Amendment until the Commission files an order especially authorizing such rates. The Commission has not as yet entered any blanket order with respect to released freight rates. It has however, permitted

Cummins amendment which the Commission had under consideration in The Cummins Amendment *supra*, was modified by the second amendment, it is still necessary to ... that by the terms of the ... the right of the carrier to ... its liability for loss, dam... or injury caused by it or its ...tions to the goods transported ...eived, or restored and made ...ble *only* as to property, ex... ordinary live stock, received for ...portation concerning which the ...ers shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property" As to ordinary live stock and all other property not falling within the exceptions stated it seems clear that the strict prohibitions of the first Cummins amendment still apply, and any such limitation of the amount of recovery without respect to the manner or form in which it is sought to be made is unlawful and void.

"It is true that the Commission in its report In the Matter of Bills of Lading, *supra*, approved a rule similar to the one now in effect and which the carriers wish to retain. Such a rule was lawful, however, as of the time of that action and down to the time when the first Cummins amendment was enacted. There is no warrant for the broad construction which counsel for respondents in the instant case now seek to put upon the language of the Commission in its report in The Cummins Amendment, *supra*. When closely read it will be observed that the Commission did not give an unqualified affirmative answer to the question categorically stated ... page 691. What the Commission did say was that 'where rates are ... dependent upon declared values the property and the rates are classified according to the character of the property of which the value of the property may constitute an element and such classification is necessarily as of the time and place of shipment.' It is therefore believed that the liability of the carrier may be limited to the value of the property as classified and established as of the time and place of shipment. To sum up what has been said upon the subject of the limitation of the carrier's liability for loss, damage or injury caused by it or its connections, property received for transportation by carriers subject to the act may, for the purpose of testing the application of the first and second Cummins amendments as we construe them, be divided into three classes: (1) Ordinary live stock which by specific exclusion from the application of the second Cummins amendment is still subject to the first Cummins amendment prohibiting any limitation what-

Supreme Court of the United States has spoken the question cannot be definitely determined as to the validity of this section, it is submitted that the reasoning of Judge Morris and the Commission, in construing the Cummins Amendment is so clear and logical that there seems no doubt their construction of the act must be upheld.

liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations. The Cummins amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.'

"Upon brief in the instant case the carriers say:

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The shippers object to this proposed language and propose the following:

'The amount of any loss or damage to property, or loss or damage due to delay in the delivery thereof under this bill of lading for which the carrier is liable by law, shall be the full actual loss, damage, or injury, including freight charges, if paid.' While the rigor of the first

4. Claims Arising Prior to June 2, 1915. As has been stated, all released rates are invalid under the Cummins Amendment, until the Commission files an order especially authorizing such rates. The Commission has not as yet entered any blanket order with respect to released freight rates. It has, however, permitted

Cummins amendment, which the Commission had under consideration in The Cummins Amendment, *supra,* was modified by the second amendment, it is still necessary to [illegible] that by the terms of the [illegible] the right of the carrier to [illegible] its liability for loss, damage or injury caused by it or its [illegible]tions to the goods transported [illegible]evived, or restored, and made [illegible] *only* as "to property, ex[illegible] ordinary live stock, received for [illegible]portation concerning which the [illegible]ers shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *." As to ordinary live stock and all other property not falling within the exceptions stated, it seems clear that the strict prohibitions of the first Cummins amendment still apply, and any such limitation of the amount of recovery without respect to the manner or form in which it is sought to be made is unlawful and void.

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the express companies to file tariffs carrying released rates. In the case of freight shipments, it considers only the individual rates, and very few of these have been authorized. Decisions, however, concerning limitations of liability are of value in considering claims which arose prior to June 2, 1915. Generally speaking, such limita-

soever, of such liability; (2) property, other than ordinary live stock, in respect to which the carriers have not been authorized or directed, in accordance with the provisions of the second Cummins amendent to make rates dependent upon values declared in writing by the shipper or agreed upon in writing as the released value of the property, and which, therefore, remains subject to the provisions of the first Cummins amendment, and (3) property, other than ordinary live stock, as to which the carriers, under the provisions of the second Cummins amendment, have been authorized or directed to make rates dependent upon declared or agreed values, in which event the carrier's liability is automatically limited to values predetermined by the declaration or agreement, and as to which, therefore, no controversy can arise respecting the time and place of ascertaining the amount of the carrier's liability. The proposed rule stipulating that the measure of the carrier's liability shall be the value as of the time and place of shipment, even if valid, could have application only to property falling within classes 1 or 2 as above defined. The question is, therefore, whether the proposed stipulation as applied to such classes of property would be a limitation of liability or limitation of the amount of recovery and therefore unlawful and void. The shippers contend that it would. In the view that we take of the law, it is unnecessary to review the arguments of the parties at any length. The general rule of the common law is that the measure of damages for which the carrier is liable, in the absence of specific stipulations in relation thereto, is the market value of the goods at destination, plus interest on such value from the date when, in general course, the goods should have been delivered, less the unpaid transportation charges, if any. Mobile & Montgomery R. Co. v. Jurey, 111 U. S., 584; O'Hanlon v. Ry. Co., 6 Best & S., 484; Rodocanachi v. Milburn, 18 Q. B. Div., 67. To the same general effect are cases decided by the various state courts. Compensation on this basis will generally make the owner whole in respect of his loss. The bill of lading provision here considered has come before the state courts for consideration in a number of cases. The decisions are not harmonious. It has been held that the rule is valid and reasonable. Denver & R. G. R. Co. v. A. Peterson Grocery Co., 59 Colo., 125; Matheson v. Southern Ry. Co., 79 S. C., 155; that its effect is not to limit or diminish the carrier's liability, but that it merely establishes a rule for determining the value of the property in case of loss. Grubb v. Atlantic Coast Line R. Co., 101 S. C., 210.

"The most recent discussion of the question whether or not the proposed rule operates as a limitation of liability in contravention of the Cum-

tions were valid. The Supreme Court of the United States has so held,[4] although in some of the state courts a different view was taken.

mins amendment is contained in M'Caull-Dinsmore Co. v. Chicago, M. & St. P. Ry. Co., 252 Fed., 664, where the district court for Minnesota, citing the provisions of the statute, reasons thus:

"'Under this language, is the provision or stipulation above referred to in the bill of lading unlawful and void? If it is an agreement as to value, which I think it is not, it is clearly so. The answer to the question must therefore be found in the answer to the further question: Was this a limitation of the liability of the carrier, or a limitation of the amount of recovery? And it seems to me the answer to this question is found in the answer to the further question: What would have been the liability of the carrier, and the consequent amount of recovery, if that provision or stipulation had not been in the bill of lading? In the latter case there can be no question, and it was so admitted on the argument, as it had to be, but that the liability and the consequent amount of the recovery would have been that of the common law, namely, the value of the goods at the point of destination at the time they should have been delivered; and that this is the actual loss to the shipper caused by the failure of the carrier to deliver the goods at that time and place, whether the value is greater or less than at the time and place of shipment, is the foundation of the common-law rule. From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open-minded consideration of the language of the amendment and the obvious and well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void.' The proposed rule, being superfluous so far as concerns the transportation of property shipped under the rates dependent upon declared or agreed values, and unlawful and void in respect of all other property, we condemn it and direct its complete elimination fro mthe proposed bill."

4. Boston & M. Ry. Co. v. Pyer, 38 Sup. Ct. 354; and cases cited therein. In 1905 an agitation for a stricter enforcement of the Interstate Commerce act might be said to have been brought to a head, and it finally culminated in 1906 in the passage of what is known as the Hepburn Act. Part of that act was known as the Carmack amendment. Its chief importance lay in the fact that it was the first assumption by Congress of any power regulating the liability of an interstate carrier for any injury to property while in its custody. The Carmack amendment contained simply the bare provision that the initial carrier was liable for any loss, damage or injury to any property that it received whether caused by it or any connecting carrier. It also provided that while the initial carrier was so liable it could recover back the amount of any claim it paid from a connecting carrier in the event that such connecting carrier

5. Measure of Damages Under Exchange Bill of Lading. Very frequently a shipment consigned to a middleman is sold in transit by him and reconsigned to the ultimate purchaser at a new destination. The middleman surrenders the original bill of lading and is given an "exchange" bill of lading. Section 3 of the Uniform Bill of Lading provides that the measure of damages in case of loss or damage must be based upon the invoice price to the consignee at the time and place of shipment. It has been a debatable question whether in case of loss or injury after the exchange bill was issued, the damages should be based upon the invoice price under the first bill of lading to the first consignee, or under the exchange bill to the ultimate consignee. In the latter case, of course the invoice price would be higher. The Supreme Court of the United States, in A. T. & S. F. Ry. v. Harold, 241 U. S. 371, 36 Sup. Ct. 665, held a shipment on which an exchange bill of lading was issued, to be a through shipment from the original shipping point to the ultimate destination. Under this decision, the measure of damages for a reconsigned

was responsible for the loss. Some time after the passage of this act the Supreme Court of the United States held in a number of cases that an interstate carrier had the right in consideration of receiving a lower rate to limit its liability in the event of loss. The best known of these cases is Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 59 L. ed. 576; 35 Sup. Ct. Rep. 351; where a shipper of automobiles, who suffered a loss of over $20,000 by reason of the carrier's negligence causing damage to one of his shipments was held to be able to recover only $50.00. This holding of the Supreme Court, although in line with its decision rendered many years before in Hart v. The Railroad Co., 112 U. S. 331, was nevertheless contrary to the great weight of authority in the state courts. A demand arose for a change in this rule and this culminated in the passage of an amendment known as the Cummins amendment approved March 4th, 1915. (This was known as Senate Bill No. 4522—Public—No. 325—63rd Congress, and the congressional record will be found burdened with discussion about it.)

This constituted a drastic change from the Carmack amendment. By this legislation Congress assumed complete jurisdiction over the entire field of loss and damage claims.

The first Cummins amendment said that a carrier must issue a receipt or a bill of lading for a shipment

"* * * and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines

shipment for which an "exchange" bill of lading has been issued, would seem to be, so far as Section 3 of the Uniform Bill of Lading is concerned, the difference between the invoice price to the first consignee and the value of the shipment in its damaged condition. However, the validity of Section 3, under the Cummins Amendment is, of course, seriously open to doubt.

6. **Delay in Transit.** No more vexatious question arises in the whole field of traffic law than the liability of the carrier for loss or damage arising from unreasonable delay in transit. This is particularly true because the carriers contest such claims more than any others. Many and ingenious have been the devices by which they have sought to escape damages for delay. The carriers are not to blame for scrutinizing claims for delay with extreme care, because such claims are the easiest for the shippers to make and the hardest for the carrier to disprove. In the case of live stock, for instance, it is well known that shippers induce the cattle to drink very freely before transportation. Confined in a close car this water passes through their bodies

such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability thereby imposed; * * *"

The act then provides that the carrier shall be liable to any party entitled to recover

"* * * for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void; provided, however, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependant upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be

with more or less rapidity and thus causes a natural shrinkage. Let the stock train be a trifle late and the live stock shipper immediately puts in a claim for shrinkage. It is for the very reason that there is a shrinkage of this kind naturally going on that the carrier of live stock is held to a strict and expeditious schedule. In the case of extremely perishable produce such as strawberries, which deteriorate very rapidly, if a train arrives a few hours late, the carrier has placed itself in a position where it must entertain a claim for damages. It should be noted here, with particular reference to what has been said in the foregoing, that a delay of not to exceed a couple of hours may really mean a delay of 24 hours because by reason of this slight delay the shipper may miss a certain market. It is a well known fact that the best markets for perishable produce are over by an early hour in the morning. If a shipment of strawberries arrives just a few hours late, the shipment will have to lay over for the next market, which may mean a total deterioration, or a forced sale to bargain hunters at a considerable loss. The most fruitful

published as are other rate schedules; * * *"

It will be noted that under this act every limitation of liability was rendered void. Of course, the carriers had in effect thousands of rates under which the value of the shipment in case of loss was released to a certain amount. This was particularly true in the case of live stock, household goods, and express shipments. It was feared and justly so that the entire system of rates based on value was invalidated. The Interstate Commerce Commission thereupon presented to Congress the second Cummins amendment, which was approved August 9th, 1916. This second amendment makes the act read as follows, inter alia:

"That any common carrier * * * shall issue a receipt or bill of lading * * * and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier * * * to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier * * * shall be liable to the lawful holder of said receipt of bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may

source of disagreement on delay claims is the provision of the Uniform Bill of Lading in Section 3, which reads as follows: "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon." Let a train be several hours late, and miss connections and immediately the freight claim agent will respectfully refer the claimant to this provision of the bill of lading and decline the claim. Yet this section, as a matter of fact, is really meaningless in that it does not change the ruling of the common law, and does not relieve the carrier from liability for failure to promptly transport a shipment. At common law and as a matter of general law throughout the United States it is held the duty of a carrier to transport all goods received with such reasonable dispatch as the character of the goods demand. Now the "character of the goods" means something more than their inherent nature. It does not mean that because brick may not deteriorate for several months the carrier can side track

be delivered or over whose line or lines such property may pass, * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreemen as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void.

"Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependend upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates vary-

a trainload of brick until convenient to haul it. The nature of the use to which the commodity is to be put is of some importance; and the character of the business in which it is to be used as well as the method of conducting that business are all matters to be taken into consideration. If brick, for instance, is sold on certain markets and fluctuates in price, it is the duty of the carrier to make those markets with reasonable dispatch. What is a reasonable time for transportation therefore depends upon a variety of considerations distinct from the mere inherent character of the shipment itself. The character of the shipment itself, however, that is, its liability to suffer deterioration during any period of transportation, no matter how short, is of prime importance and it is for this reason that shipments of live stock and of perishable produce must be transported immediately and as expeditiously as possible. A rush in business does not excuse the carrier for failure to do this, because it is its duty to provide facilities. On the big trunk lines, as a matter of fact, schedules are published under which it is shown that certain trains are

ing with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

Under this amendment the Interstate Commerce Commission was empowered to order or authorize interstate carriers to maintain released rates on all shipments except ordinary live stock. In this respect it was radically different from the original Cummins amendment under which the Commission could only authorize released rates in cases where the shipment was hidden from view.

The first Cummins amendment has recently received exhaustive consideration by Judge Page Morris, United States District Judge for the Division of Minnesota. McCaull-Dinsmore Co. v. C. M. & St. P. Ry. 252 Fed. 664. His language is illuminating and throws light upon the situation which led to the passage of this second Cummins amendment and is also of value in determining the proper measure of damages to be determined under the second Cummins amendment in cases where the Interstate Commerce Commission has not authorized the filing of a released rate.

Judge Morris held that Section 1 of the Uniform Bill of Lading, restricting the measure of damages to the value of the shipment at origin was void.

It is very clear that no released

supposed to make certain markets at certain times. While the publication of these schedules does not constitute a special contract with the railroad by which the railroad is an insurer to make such markets, as a practical proposition they are almost conclusive evidence before a jury as to what is a reasonable time for the transportation. By referring back to Section 3, it will be found that it provides that the carrier is not bound to transport the property by any particular train or any particular market "otherwise than with reasonable dispatch." Now what is "reasonable dispatch" is a question for the jury to determine solely with reference to the facts and circumstances of each particular case. It, therefore, is evident that this provision does not change the general rule. Considering the nature of the goods, it is not reasonable dispatch for a railroad not to transport perishable produce immediately and to fail to reach a market which shippers are in the habit of reaching by a specified time. If a shipment made from the same vicinity makes the market while a shipment on which a claim is filed does not, the carrier

rate is valid under the second Cummins amendment unless it is specifically authorized by the Commission.

The act provides that the provisions of Section 20, which invalidate all released rates shall not apply to property "concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; * * *"

In Express Rates and Practices, 43 I. C. C. 510, the commission said, p. 513:

"The act as amended, fixes upon the carrier liability for the full actual loss, damage, or injury, caused by it to ordinary live stock, and invalidates any limitation or attempted limitation of that liability, wherever or in whatever form it is found. Ordinary live stock is excepted from the property as to which we are empowered to authorize or require the establishment of rates dependent upon declared or released value. If rates on ordinary live stock dependent upon declared value could lawfully be maintained without authorization by the Commission, there might and probably would be instances in which conflict would arise as between the liability imposed by the act upon the carrier and the prohibitions of section 10 of the act affecting shippers. We can not, in view of the provisions of the law, authorize or sanction such rates upon ordinary live stock; neith-

certainly is liable whether the delay is one-half an hour or five hours, if damage has actually occurred. While the question has long been settled by the almost unanimous weight of authority in the state courts, the Supreme Court of the United States has not had an opportunity to pass on the question until very recently. The case of the N. Y. P. & N. R. R. Co. v. Peninsula

er can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission. Under such authority both shipper and carrier are fully protected and the full spirit of the law is observed."

In Williams Co. v. H. & N. Y. Transportation Co., 48 I. C. C. 268, the Commmission said, p. 272:

"The original Cummins amendment laid upon the carriers liability in full for any loss, damage, or injury caused by them to the property transported, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value in any receipt, bill of lading, or in any contract, rule, regulation, or tariff; and any such limitation, without respect to the manner or form in which sought to be made, was declared to be unlawful and void. It was further provided that in instances where goods were hidden from view by wrapping or other means, the carrier might require the shipper to state specifically in writing the value of the goods and should not be liable beyond the amount so specifically stated. By the amendment of August 9th, 1916, the proviso last referred to was amended so as to provide that the provisions respecting liability for full actual loss, damage, or injury and declaring any limitation thereof to be unlawful and void shall not apply to baggage or to property, except ordinary live stock, on which the carrier has been or shall thereafter be authorized or required by order of the Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property in which case such declaration or agreement shall have no other effect than to limit liability and recovery to any amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of the act. The rates assailed were in effect on August 9th, 1916. No authority has been granted by us for their publication in terms of value. The plain and unmistakable purpose of the Cummins amendment was to make unlawful and void, except as otherwise provided therein, all attempted limitations of liability for loss, damage, or injury to property transported."

The Commission continued, p. 274:

"Under the act, as now amended, we can not fairly or effectively differentiate between released rates and rates based on actual value, for the reason that carriers can have no knowledge of the actual value except as declared by the shipper. In view of the fact that the rates assailed require a declaration of value by the shipper, and were published without our authority, we are of the opinion that they are unlawful."

Exchange of Maryland, 36 Sup. Ct. 230,[5] finally settles the disputed question of the correct construction to be given Section 3. The facts in the case were as follows: On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York City. The property was delivered at destination some hours later than the customary time of arrival and suit was brought to recover damages for failure to make the market. On the ground that, by failure to make the market, the railroad did not transport with reasonable despatch, the shipper secured a judgment in the Court of Appeals of Maryland, 122 Md. 215, 89 Atl. 433. An appeal was taken to the Supreme Court of the United States on two questions, which were as follows: "(1) Does the Carmack Amendment impose on the 'initial carrier' liability for delay occurring on the line of its connection without

Also see Silk Ass'n v. Penn. R. R., 50 I. C. C. 50.

There seems to be some impression to the effect that the mere filing of a tariff with the Commission is an approval of it and a compliance with the second Cummins amendment. It is obvious this is not true, because the act provides that such rates must be *expressly authorized* by the Commission. The negligence of the carriers in failing to secure orders of the Commission authorizing released rates led to the passage by the Commission of its Public Order of April 6th, 1918, which called the attention of the carriers to the fact that no released rate is valid unless expressly authorized.

In this connection sight should not be lost of Released Rates Order No. 4, of May 12, 1918, which prescribes the procedure for securing such permission from the Commission. To sum up: Released rates today are only valid when expressly authorized by the Interstate Commerce Commission. If otherwise exacted, the limitation is void.

The Supreme Court of the United States has held that a carrier, even by a released rate, on a claim arising before the Cummins Amendment, cannot, in certain cases, relieve itself from liability for negligence. A provision in a uniform live stock agreement filed with the Interstate Commerce Commission and covering an interstate shipment which limited the shipper's damages for unusual delay resulting from negligence to the amount actually expended by the shipper in the purchase of food or water for the stock while detained is invalid as a contract exempting the carrier from liability for its own negligence, and cannot be sustained as a contract limiting recovery to an agreed valuation in consideration of a reduced rate. Boston & M. R. R. v. Piper, 38 Sup. Ct. 354.

5. 240 U. S. 34; 60 L. ed.——.

physical damage to the property? (2) Was the plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided: 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon.' The Supreme Court held that under the Carmack Amendment the initial carrier was just as liable for damages due to delay on the line of a connecting carrier as for any other damages. Concerning the second question, that is, liability for failure to meet the market, the court said that it was the duty of the the jury to award damages for failure to transport with reasonable dispatch, and if the jury found that it was not reasonable dispatch to make the market on a certain date, they were justified in awarding damages for such failure. The Supreme Court, however, did not directly pass on what would be the correct measure of damages. It appeared that in the trial court a wrong measure of damages had been used, but the case was not reversed on this account, because the state court held that the railroad had not been injured by using the wrong measure of damages, and the Supreme Court of the United States held this aspect of the case involved no federal question. Irrespective of the bill of lading, the general rule as to the measure of damages arising from negligent delay by a common carrier in the delivery of goods intended for sale in the market at point of destination is the difference between the market value of the goods when they should have arrived and the value at time of delivery.[6] Multitudinous are the cases which deal with delay in

6. Foster v. I. & G. N. Ry. Co., (Tex. 1915), 175 S. W. 762, 763.

A shipment of cattle was negligently delayed so that the cattle lost considerably in excess shrinkage. The cattle brought the market price; the only loss suffered by the shipper being the lost weight. Held that, as the measure of damages is the difference between the market value of the stock at the time and in the condition in which they were deilvered and their value if delivered in time, the shipper could not, having recovered for shrinkage, also recover for loss in selling appearances, for that would allow a recovery of double damages for the same item. International & G. N. Ry. Co. v.

transit. Infinite are the various elements that have been presented as items of damage, but the legally correct measure of damages under the Cummins Amendment is simple. It is the difference between the actual value of the shipment at destination at the time it should have arrived and its value at the time it actually did arrive. Of course, under Section 3 of the Bill of

Rhoden (Tex. 1915) 177 S. W 984.

Though the market price was higher on the day the shipment reached the point of destination than on the day it should have reached there, the carrier is not entitled to a judgment in its favor where the shipper sought recovery, not only for depreciation of the market, but on account of shrinkage of animals by reason of delay. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916) 182 S. W. 361, 362.

The measure of damages recoverable by shippers of live stock for delay in transit was the difference in the market value of the cattle on arrival at market and their market value when and in the condition in which they should have arrived, unless the carrier's negligence caused the shipment to be held over for market after arrival. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916) 183 S. W. 384.

In an action by shippers of live stock for delay in transit, where there was no basis in the pleadings for proof of shrinkage in weight after the shipment's late arrival, or for the decline in the market for which the cattle were held over, the court erred in submitting such matters to the jury, as well as an item for additional feed, as recovery should have been confined to the damages suffered by reason of the shrinkage in weight on account of the cattle's failure to arrive before a time which, though late, was nevertheless early enough to make a market before the one at which they were actually sold. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916) 183 S. W. 384.

Irrespective of any provision which might be in the bill of lading the measure of damages in cases of delay is well stated in Michie on Carriers, p. 637, as follows: "That the measure of damages for delay in the delivery of goods by a carrier is the difference between their value when actually delivered and what they would have been worth upon seasonable delivery, is the usual, but not the universal rule. In addition to this difference in market value, the carrier will be liable also for such other and incidental damages as naturally and proximately flow from the delay, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as the probable result of a breach of it. The carrier is liable for such damages as are the natural result of the delay, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was

Lading, the measure of damages, if it is held that such section does apply to cases of delay, would be the difference between the market value of the shipment at the time and place of shipment, plus the freight charges and the market value of the shipment at the time it actually did arrive. In this connection it should be noted that the courts hold that Section 3 does not

entered into as a probable result of a breach of it. While the carrier is prima facie only liable for the natural and ordinary consequences of the breach of contract by delay; but where, at the time of entering into the contract, both parties knew and contemplated that if such breach is committed some injury will occur in addition to the natural and ordinary consequences of the breach, the carrier will be liable to give compensation or damages on the occurrence of the injury. T. M. Ry. Co. v. King (Tex. 1915), 174 S. W. 336, 337; T. & P Ry. Co. v. Martin Bros. (Tex. 1915), 175 S. W. 707, 708; Rogers v. T. & P. Ry. (Tex. 1914), 172 S. W. 1117, 1119.

In an action against a common carrier for negligent delay in the carriage and delivery of machinery intended for use, the proper measure of damages, in the absence of special notice, is the usable value of the same during the period of delay, together with such reasonable expenses as may be incurred by the owner in searching therefor in an attempt to procure the delivery thereof. Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co. (Okla. 1917) 165 Pac. 1133.

In action against a carrier for delivering cattle at the wrong pen in a stockyard, the measure of damages is the difference in actual market value at the proper pen and the pen at which delivered, and not the average difference in values between such pens. Illinois Cent. R. Co. v. Smith (Miss. 1917) 75 So. 120.

A brother or sister may, in a proper case, recover damages as for mental pain and anguish against a common carrier, resulting from its negligence or breach of contract in the carrying or delivering of a corpse. Deavors v. So. Exp. Co. (Ala. 1917), 76 So. 288.

Plaintiff sued defendant carrier to recover damages for negligence in the carrying or delivering of the corpse of her brother consigned to her in Alabama and shipped from Kansas. Defendant had no agent at the place of delivery, and the coffin containing the corpse was placed on a truck and wheeled under a shelter or shed, but got wet from rain blowing in or breaking through the top thereof. *Held,* that the damages sustained were the consequences of the breach of the contract for an interstate shipment governed by the federal laws, and therefore plaintiff, having failed to show any damage other than mental anguish, could not recover. Deavors v. So. Exp. Co. (Ala. 1917) 76 So. 288.

It is well-settled law in this state that there is at least a quasi legal right in, to, or concerning dead bodies, which the courts will recognize and protect by proper action. Deavors v. So. Exp. Co. (Ala. 1917), 76 So. 288.

Where a sister sued a carrier for damages in allowing a coffin contain-

apply to cases of delay in transit.[7] A charge by a carrier for the feeding of live stock rendered necessary by a negligent delay in transportation is a proper element of damages to the shipper.[8] Testimony of a cattleman, who had inspected the stock in question at destination, as to the difference between their value and what it would have been had they been brought on without delay, was inadmissible as an opinion on a mixed question of law and fact.[9] Where some cattle shipped by rail were dead when they reached destination, negligent delay of the shipment at an intermediate point being the proximate cause, the measure of the shipper's damages for the dead cattle was their market value at destination on arrival had no delay occurred.[10] Where cattle shipped reached destination afflicted by distemper or

ing the body of her borther to remain on the platform in the rain, evidence that she had agreed with her brother, who paid express charges, to pay thereof, showed no loss in property or estate, authorizing any recovery other than for mental anguish. Deavors v. So. Exp. Co. (Ala. 1917), 76 So. 288.

In an action against a common carrier for failure to notify the consignor of nondelivery, an instruction that the measure of damages was the difference between the market value of the goods when notice should have been given and their value when it was actually given, if erroneous, was harmless, where the verdict gave the proper amount of damages. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 165 Pac. 363.

7. The statement in a shipping contract that the measure of damages or loss or injury to property shall be based upon the invoice price to the consignee at the place of shipment or upon a specified amount does not apply to cases of negligent delay in the transportation or delivery, but refers solely to loss, injury, or damage to the property itself. Chicago, R. I. & P. Ry. Co. v. Cunningham Comm'n Co. (Ark. 1917), 192 S. W. 211, 213. Elliott v. C. M. & St. P. Ry. Co. (S. Dak. 1917), 161 S. W. 347, 349, Panhandle & S. F. Ry. Co. v. Bell (Tex 1916), 189 S. W. 1097.

Damage from a decline in the market price during delay in transportation of live stock is not within the provision of a contract of shipment for notice of loss or injury to stock during transportation. Panhandle & S. F. Ry. Co. v. Bell (Tex. 1916), 189 S. W. 1097.

8. Tobin v. Lake Shore & M. S. Ry. Co. (Mich. 1916), 159 N. W. 389.

8½. Steinberg v. Erie R. R., 170 N. Y. S. 893.

9. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932

10. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

catarrhal fever, proximately caused by the negligent delay of the shipment at an intermediate point, the measure of the shipper's damages was the difference in the market value of the cattle in their diseased condition at destination on arrival and such value in the condition they would have been in had the delay not occurred.[11] Where the shipper of cattle by rail, upon part of the shipment being necessarily delayed by repairs becoming necessary to the cars, refused the road's offer to forward the residue of the shipment immediately, stating that he preferred that the entire shipment go forward at the same time, he could not recover for the delay of the residue of the shipment, so offered to be immediately transported.[12] In action against a carrier for injuries to stock shipped, shrinkage, depreciation in market value, and decline of market price during delay were all proper elements of damage.[13] Where cattle were not shipped for immediate sale

11. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

12. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

13. P. & S. F. Ry. Co. v. Harp (Tex. 1917), 193 S. W. 438.

The statement in a shipping contract that the measure of damage or loss or injury to property shall be based upon the invoice price to the consignee at the place of shipment or upon a specified amount does not apply to cases of negligent delay in the transportation or delivery, but refers solely to loss, injury, or damage to the property itself. Chicago, R. I. & P. Ry. Co. v. Cunningham Comm'n Co. (Ark. 1917), 122 S. W. 211, 213. Elliott v. C., M. & St. R. Ry. Co. (S. Dak. 1917), 161 S. W. 347, 349. Panhandle & S. F. Ry. Co. v. Bell (Tex. 1916), 189 S. W. 1097.

In an action against a carrier of live stock for damages caused by delay in transportation, where it was shown that defendant employed a man to take care of the stock while unloaded during a delay, and there was no evidence showing what amount plaintiff expended for labor to assist him in caring for his stock while unloaded, the issue should not have been submitted to the jury. Ft. Worth & D. C. Ry. Co. v. Atterberry (Tex. 1916), 190 S. W. 1133.

In Stewart Poultry Co. v. Erie R. Co. (Kan. 1917), 163 Pac. 448, the court said, p. 449: "The defendant also complains of the instruction concerning the measure of damages. The court instructed the jury that the measure of damages was the difference between the market value of the poultry in New York on the day when it should have arrived there and the market value on the next market day, plus any expense reasonably incurred for feed and care of the poultry, made necessary by the delay in transportation. The evidence tended to show that Wednesday practically closed the poultry market for

ırket, the measure of the shipper's damage from injury was the difference between the market price of the the condition in which they were delivered and what ket price would have been had they been properly cared andled during transportation.[14] In an action by the against a carrier for the recovery of damages occa-

and that there was no market until the next e instruction properly he measure of damages. . v. Fry, 74 Kan. 546, 87 Railway Co. v. Fry, 79 Pac. 205; Hayes v. Rail- 4 Kan. 1, 113 Pac. 421; ilway Co., 90 Kan. 244, 17."

on against a railroad for illions in transit, instruc- asure of damage was dif- veen what jury found the ıld have been sold for on ' of a sale and what they vards sold for, provided d them "at the market unfortunate in the use of ıarket price" rather than ue." Elliott v. Chicago, '. Ry. Co. (S. D. 1917), 347.

S. F. Ry. Co. v. Mor- 1917), 191 S. W. 138.

ion for delay in a ship- stock, where the market cattle on Thursday was practically beyond ques- introduction of the ac- it being agreed that it market value of the dif- als sold; plaintiffs were mitted to testify as to the n the market value of on Tuesday and Thurs- than stating what the e was on the two dates, and leaving to the jury the question of determining the difference. St. L. Ry. Co. v. Miller & White (Tex. 1916), 190 S. W. 819, 820.

Where the evidence was undisputed as to damages to strawberries from delay, etc., and nothing in the bill of lading providing for a different rule of damages was set up at the trial or urged as an objection to the measure of damages is assessed, and there was no testimony that the shipper had any other option than to ship under the contract made, no question could be made that the damages were erroneously assessed upon a different basis than provided for in the contract of carriage of an interstate shipment. Prescott & N. W. R. Co. v. Davis (Ark. 1917), 191 S. W. 210.

In an action for damages through delay in transporting a shipment of live stock, an instruction that the measure of damage would be the depreciation in the value of the animals caused by the negligent delay, held proper. Blackwell v. Oregon Short Line Ry. (Ore. 1916), 161 Pac. 565.

In an action for damages for delay in transporting a shipment of live stock, evidence as to its market value at destination and of shrinkage per head held admissible; the value at the point of shipment and at destination being concededly the same except for the shrinkage. Blackwell v. Oregon Short Line Ry. (Ore. 1916), 161 Pac. 565.

sioned by the negligent delay of the carrier in the transportation and delivery to the consignee of several shipments of crate material for the use of the consignee in the shipment of his crop of tomatoes, it is incumbent upon the claimant to prove by competent evidence the amount of damages which he has suffered as a proximate result of such negligent delay.[15] The measure of damages for negligent delay in the transportation of freight by a common carrier is the difference between the value of the freight at the time it was delivered and its value at the time it should have been delivered, unless the carrier had notice that special damages or more than ordinary damages would result from a failure to deliver in time.[16] Unusual loss to a shipper of seasonal goods, such as millinery, does not create an exception to the ordinary rule as to the measure of damages, namely, difference in the market value of the goods when they should have arrived and when they did arrive.[16½]

15. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

In Chicago, R. I. & P. Ry. Co. v. Cunningham Commission Co. (Ark. 1917), 192 S. W. 211, the court said, p. 212:

"Again it is contended that the court erred in its declaration of law to the effect that appellee's measure of damages on the claims for delay was the difference between the market price of the grain at Little Rock on the date the grain should have arrived there and the market price thereof at the same place on the dates the grain did arrive. The measure of damages for negligent delay in the transportation of freight by a common carrier is the difference between the value of the freight at the time it was delivered and its value at the time it should have been delivered, unless the carrier had notice that special damages or more than ordinary damages would result from a failure to deliver in time. C., R. I. & P. Ry. Co. v. Newhouse Mill & Lbr. Co., 90 Ark. 452, 119 S. W. 646, and cases cited; and K. C. & Memphis Ry. Co. v. Oakley, 115 Ark. 20, 170 S. W. 572.

16½. Steinberg v. Erie R. R. 170 N. Y. S. 893; Beaver v. Barrett. 171 N. Y. S. 322.

16. Chicago, R. I. & P. Ry. Co. v. Cunningham Commission Co. (Ark. 1917) 192 S. W. 211. In Western Transit Co. v. Leslie Co., 37 Sup. Ct. 133, the court said, p. 136: "The valuation clause fixes not an arbitrary limit of recovery, but a ratio. In Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 656, 57 L. ed. 683, 689, 33 Sup. Ct. Rep., 391, where the released valuation clause was applied to a shipment consisting of two boxes and a barrel, and one box was lost, this court said the consignor and carrier must have understood the agreed valuation to mean that the package contained 'household goods of the average value per hundredweight of $5.' The ratio

7. Measure of Damages When No Market at Destination. However, cases arise where there is no market at original destination, but the shipment must be diverted to another market. In an action for loss and damages to a shipment of peaches, diverted at original destination, it was contended that the verdict was excessive, for the reason that Burlington was the point of destination, and the condition of the market there should be the sole test. There was no market for the peaches there and owing to improper icing the shipment could not stand a further

is more naturally applied where the whole shipment is homogeneous. Under this bill of lading the shipper is entitled to recover not more than $100 a ton for each or any ton damaged or lost."

In Baird v. D. & R. G. R. Co. (Utah 1916), 162 Pac. 79, the court said, p. 81:

"We can perceive no good reason for sustaining the third ground stated above. The claim made by the plaintiff is not in excess of the amount or value stated in the contract of shipment, but in fact is much less. Indeed, the plaintiff claimed only a small fraction of the amount stated in the contract of shipment. Defendant's counsel have referred us to no case wherein it was held that the carrier is not liable for the actual damages, provided the amount claimed per head is less than the valuation limited in the contract of shipment. All that is decided in the cases to which we are referred (Missouri, K. & T. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed 690, and Cleveland, etc, Ry. Co. v. Dettlebach, 239 U. S. 588, 36 Sup. Ct. 177, 60 L. Ed. 453) is that, where the shipper elects to ship at the reduced rate and agrees to a particular valuation, he is bound by such valuation, and in case of loss or damage he cannot recover in excess of the agreed value. As we construe the valuation clause in the shipping contract in question, the effect of the ruling of the district court is not contrary to said clause nor against the rulings in the cases referred to above, and therefore is not erroneous."

The measure of damages for delay in the transportation of valuable machinery, lost profits not being recoverable because of the carrier not having notice is the rental value. Brothers, v. Illinois Cent. R. Co. (Ala. 1917) 77 So. 423.

In Brothers v. Ill. Cent. R. Co. (Ala. 1917), 77 So. 423, the court said, p. 424:

"It is a basic principle of the law that every wrong has a remedy, and it is the policy of the law, wherever possible, to render such remedy adequate. In other words, the law attempts at all times to give a substance rather than a shadow. It was said in Hadley v. Baxendale, L. R. 9, Exch. 341, which appears to be the earliest case on the subject, and which has been followed since that time, that:

"'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be

journey. It was said the shipper was entitled to recover an amount which would compensate him for the difference between what he would have realized for the peaches at the point of destination, if the car had been properly iced, less the market value in the damaged condition. Treating Burlington as the point of destination, it does not necessarily follow that the state of that market on the date the peaches reached there was the sole test, for if there was no satisfactory market there the shipper was entitled to carry his products to some other available

considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.'

"In the instant case, the plaintiff is admittedly entitled to recover from the defendant for a breach of duty, but by reason of the fact that at the time of the shipment, the defendant did not have notice either by direct information or by being in possession of facts and circumstances which would have put it on notice, the plaintiff cannot recover for lost profits or for lost business, or things of that kind, but the defendant had notice of the kind and character of the shipment, and the plaintiff is entitled to compensatory damages for the delay, if it can be proven. The rule laid down in cases of this kind, as stated in Ruling Case Law, is:

" 'The usual compensatory damages recoverable for failure promptly to deliver machinery is the value of the use of the machinery during the delay—i. e., its rental value.' 4 R. C. L. 939.

"In the case of Priestly v. Northern Indiana & Chicago R. R. Co., 26 Ill. 205, 79 Am. Dec. 369, the judge, in discussing the measure of damages for a failure to deliver machinery within a retasonable time, said:

" 'The principle announced by the court, in its instruction, and which determined the case, the jury finding nominal damages only, is not the law. The proposition cannot be entertained for a moment, that under a contract to deliver, in a reasonable time, valuable machinery, such as described in the declaration, that the difference in the market value of such machinery, at the time it was in fact delivered, is all the damage the owner of the machinery is entitled to claim. If this was the measure, there could be no great incentive to the carrier to perform promptly a contract for the delivery of such machinery as that are not liable to deteriorate in a few days or months. As to perishable articles of fluctuating value, such as grain, live stock, etc., this rule is doubtless the true one, and has been recognized by this court in several cases.'

"In the Priestly Case, supra, the court said:

" 'In this case, the inquiry should have been, What was the value of the use of such machinery in such a factory, for the time it was detained? In other words, what was a reasonable rent for it?' This

:t.[17] The mere fact that the Burlington market was in :ondition that the fruit could not have been advantageously ;ed of, even if it reached there in good condition, does not ;e the shipper of the privilege of taking the fruit to another :t, which would have been available to him if the car had properly iced so as to stand a longer journey. It is unim-nt whether there was a contract for the diversion of the - not, for the reason that the shipper had the right to reship uff from Burlington, so as to reach a better market. - It is he real question in the case, so far as the amount of damages ncerned, is whether or not the car of fruit would have ed the best available market if it had been properly iced, and ıer or not the failure of the carrier to ice the car according e contract had deprived the shipper of that market. If it :hen he is entitled to the difference between the market of the fruit in the condition in which it would have been if ı been properly iced and the market value in its damaged tion.[18] The measure of damages for the failure of a com-

n seems to us to state the ule as applied to the facts in ıse, and to be based upon the principles of justice. We ore conclude, based upon the ·ities cited, that under the in this case the measure of ;es would be the value of the : the machinery during the de-. e., its rental value."

St. Louis I. M. & S. Ry. Co. lby (Ark.. 1915), 174 S. W. 1170 And see, Grand Tower o. v. Phillips, 23 How. (U. S.),

St. Louis, I. M. & S. Ry. Co. by (Ark. 1915), 174 S. W. 1167,

an action against an express ıny for delay in transporting no for a showman, the ship-testimony as to the difference ı earnings at C., to which the piano was shipped, without it, and the average earnings in towns of approximately the same size and under the same conditions as C., was admissible to show actual damages. Piero v. Southern Express Co. (S. C. 1916) 88 S. E. 269.

The general rule is that in case of a loss of the goods the measure of damages recoverable by the shipper is the market value of the goods at point of destination, with interest from the time they should have been delivered, less the amount of the freight charges due for their transportation.

Railway v. Portrait Co. (Ga. 1905), 49 S. E. 727.

Railway v. Supply Co. (Ga. 1906), 54 S. E. 530.

Blackmer v. The Railway (Mo. 1903), 73 S. W. 913.

Railway v. Rines & Co. (Tex. 1905), 84 S. W. 1092.

mon carrier to deliver goods is the value of the goods at the
and place of destination in the condition in which they sh
have been delivered, and the owner is entitled to recover

Railway v. Dougherty, 7 App. D. C. 378.
Silverman v. Railway, 26 So. 447.
Armistead v. Railway, 32 So. 456.
Peterson v. Railway, 103 N. W. 621. 621.
Railway v. Dishman, 85 S. W. 319.
Railway v. Stock & Sons, 51 S. E. 161.
Ency. of Law and Procedure, Vol. 5, p. 373, et seq.
Hutchinson on Carriers, 3rd Ed., Sec. 1360.
Moore on Carriers, 2nd Ed., p. 592.

If there is no market at the place where the goods are to be delivered, their value at the nearest market less the cost of transportation thereto, is to be taken as the measure of the shipper's recovery.

Ency. of Law & Procedure, Vol. 5, p. 375 et seq. et 381, and cases cited.

When the goods are merely damaged and all are delivered in the damaged state, the measure of damages is the same as in case of a total loss, except that the carrier is entitled to have deducted the fair value at the time and place of delivery of the goods in their damaged state.

Ency of Law & Procedure, Vol. VI. 5, p. 382.
Hutchinson on Carriers, 3rd Et., Sec. 1362.

The United States Supreme Court in The Queen of the Pacific, 180 U S. 49, held that goods sold by auction in a great mart of commerce is a proper method of termining the value of goods aged in the hands of a ca Furthermore, not only is the n ure of damages the market at the nearest available ma but it must be for the goods in quantities sold.

Grand Tower Co. v. Phillips How 471.
Kilpatrick v. Whitmer & S 118 App. Div. N. Y. 98.
Stecker v. Weaver Coal & C Co., 116 App. Div. N. Y. 77
Wehle v. Haviland et al, 69 N 448.
Marshall v. Clark, 78 Conn. 11.
Johnson & Thornton v. Alle Jemison, 78 Ala. 382.
Hewson-Herzog Supply Co. Minn. Brick Co., 57 N. W.
Tuttle Chapman Co. v. Coal Fuel Co., 113 N. W. 827.
Yellow Poplar Lumber Co. Chapman, 74 Fed. 444.
O'Gara v. Ellsworth, 83 N. Y 121.
Railway v. Payne, 38 S. W. 36

In Grand Tower Company Phillips, 23 Wall 471, the court page 480:

"The true rule would seem to b allow the plaintiffs to show the they would have had to pay for in the quantities which they were titled to receive it under the tract, at the nearest available ma where it could have been obta The difference between such and the price stipulated for by contract, with the addition of increased expense of transport

e, less the charges for transportation and delivery.[19] How-
, under section three of the Uniform Bill of Lading the meas-
of damages is the invoice price to the consignee at the time
place of shipment.[20] But in the absence of a market value
shipment, its intrinsic value would be the proper measure,
in such case evidence of the price paid therefor would be
issible as a circumstance to be considered in determining
value.[21] Therefore in an action to recover for the loss of an
le which had no market value, the measure of damages
ld be the value of the article to the plaintiff, and in ascertain-

auling, if any, would be the measure of damages."

Meek v. U. P. R. Co. (Kans. , 147 Pac. 1112
measure of damages for in- to cattle shipped for pastur- s the same as for injuries to shipped to market for sale. & N. T. Ry. Co. v. Holmes 1915), 177 S. W. 505.

Coleman v. N. Y. N. H. & H. R. (Mass. 1913), 102 N. E.

G. H. & S. A. Ry. Co. v. Pat- (Tex. 1915), 173 S. W. 273,

an action for injuries to a ent of horses, evidence of actual value at the point of ation is admissible, where it did ppear that they had any market at such point, Texas & P. Ry. McMillen (Tex. 1916), 183 S. 3.

such case, evidence that the ent had a good run after be- lelivered by defendant to the cting carrier is admissible g to show that the loss oc- l while the horses were in de- nt's custody. Texas & P. Ry. McMillen (Tex. 1916) 183 S. 73.

In such case, though the defendant railroad company limited its liability to damages occurring on its own line, and though the shipment was an interstate one, it was liable for damages caused by its negligence, though such damages did not develop until after the animals were delivered to the connecting carrier. Texas & P. Ry. Co. v. McMillen (Tex. 1916) 183 S. W. 773.

Where hogs died in transit, the measure of damages is their market value at point of destination, or, in case there was no market value, their intrinsic value at such point. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916) 182 S. W. 361.

In an action against a carrier for the conversion of freight, evidence as to the condition and value of the property when it was stored with a furniture company four months before shipment and eight months before the conversion, and that the goods were so well crated and packed that the carrier waived its usual rule requiring payment of freight in advance, is sufficient to raise the presumption that the value continued the same at the time of conversion as at the time of storage. Whitley v. Gulf C. & S. F. Ry. Co. (Tex. 1916) 183 S. W. 36.

ing this value, inquiry may be made into the constituent elements and the cost to the plaintiff of producing the article. Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value, or the claimant's damages, must be ascertained in some other rational way, and from such elements as are attainable.[22] And where damage is certain, but the amount is uncertain, a recovery may be had, including loss of prospective profits, although the amount of such loss is uncertain.[23] So a mechanic who has constructed a model plow on which he had secured a patent and which had no market value can recover from a carrier which had lost the same in transit the value of the materials furnished and the work done by others on the model.[24] In determining damages for the conversion of freight by a carrier, secondhand household fixtures are regarded as having no recognized or fixed market value, but the court should consider the original cost of the property, the manner in which it has been used, its general condition and quality, its age, etc.[25] In an action for loss of household goods and wearing apparel, which have no fixed market value, the measure of damages is the value of the goods to the owner; not a fanciful value which such owner might place upon them, but such reasonable value as they had to him, considering the nature and condition of the goods and the purposes for which they were adapted.[26]

8. **Expense of Tracing Goods.** Since questions sometimes arise as to whether the expense of telegraphing for goods and

22. St. L., I. M. & S. Ry. v. Dague (Ark. 1915), 176 S. W. 138, 139.

23. Detmer-Wallen Co. v. D. L. & W. R. Co., 153 N. Y. 287, 289.

24. St. L., I. M. & S. Ry. (Ark. 1915), 176 S. W. 138, 139.

25. Whitley v. Gulf, C. & S. F. Ry. Co. (Tex. 1916), 183 S. W. 36.

26. O. K. Transfer & Storage Co. v. Neill (Okla. 1916), 159 Pac. 272. St. L. S. F. R. R. v. Dunham, 36 Okla. 724; 129 Pac. 862.

tracing them in various ways can be received as damages, it may be of interest to note a recent case. In this case it was stated that where goods have not been lost or destroyed during transportation, but are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered and as they should

Where the evidence shows there is no market value of property in question at the place which under the general rule governs in fixing the damages for its loss or injury, it is permissible to show the market value at other places, with cost of transportation or other facts that will enable the jury to deduce the value at the place in question. Louisville & N. Ry. Co. v. Dickson (Ala. 1917), 73 So. 750.

In Louisville & N. R. Ry. v. Dickson (Ala. 1917), 73 So. 750, the court said, p. 751:

"Where the evidence shows that there is no market value of property in question at the place which under the general rule governs in fixing the damages for its loss or injury, it is permissible to show the market value at other places, 'with cost of transportation or other facts that will enable the jury to deduce the value at the place in question.' However, evidence of the market value at other places than the places usually governing in such matters is not admissible where the evidence is clear that there is a value at that place. Comer & Co. v. Way & Edmundson, 107 Ala. 310, 19 South, 966, 54 Am. St. Rep. 93; Johnson & Thornton v. Allen & Jemison, 78 Ala. 392, 56 Am. Rep. 34."

In action for damages to goods shipped, evidence that the carrier sold the goods after being advertised for $145 did not conflict with an answer of the jury to special issue that the goods, when tendered to the consignee, had no market value, where evidence of such sale was offered for the limited purpose of showing that the carrier had complied with its statutory duty to advertise and sell goods refused by the consignee. Houston, E. & W. T. Ry. Co. v. Brackin (Tex. 1917), 191 S. W. 804.

In such action, testimony of consignee that the potatoes did not have any market value when received was not open to objection that he did not know anything about the market value of damaged potatoes at such place, where it appeared that he was a farmer and had been in the business of raising and shipping potatoes for 20 years or more. Houston, E. & W. T. Ry. Co. v. Brackin (Tex. 1917), 191 S. W. 904.

In action by consignee for damages to goods in transit, it was not error to admit testimony that he tried to sell the goods, but certain firms refused to make an offer on them, where the consignee specifically stated that such evidence was to show consignee's efforts to minimize damages and not to establish value of the shipment or its lack of value. Houston, E. & W. T. Ry. Co. v. Brackin (Tex. 1917), 191 S. W. 804. Also see Y. & M. V. R. R. v. Cox (Miss. 1917), 74 So. 779.

have been delivered, and with such other damages as have naturally and proximately resulted from the injury. Under the latter head, the owner would be entitled to recover for reasonable expenses in seeking to reclaim the goods, or in restoring them to their former condition, or endeavoring to reduce the loss to its lowest amount. And interest could be allowed by the jury. If the goods had been restored to their original value by the repairs, the measure of damages would, of course, be the reasonable cost of the repairs; if not fully restored, then the reasonable cost of repairs plus the difference in value of the articles as restored and their original value.[27] But in an action for damages for delay in the delivery of a trunk, there can be no recovery for expenses incurred in tracing the trunk, without evidence from which it can be inferred that such expenses were reasonable or necessary.[28]

27. H. W. Little & Co. v. A. C. L. R. Co. (N. C. 1915), 85 S. E. 18, 19.

But such expenses must be alleged and paid, 6 Cyc. 452. Southern Ry. Co. v. Webb, 143 Ala. 304, 39 S. 262, 111 Am. St. Rep. 45, 5 Ann. Cas. 97; L. & N. R. R. Co. v. Cheatwood (Ala. 1915), 68 So. 720, 721.

28. Lichterman v. Barrett, 157 N. Y. S. 882, 883.

Considerable confusion arises as to the rights of a claimant to recover such expenses as telegraphic tracers, repacking, cartage and the like. Elements of this kind are useful in determining what is the value of the shipment at destination, but are not recoverable as damages from the carrier. For instance, perishable produce is shipped to a commission merchant at destination, and the expenses of cartage and commission, are deducted from the price realized in remitting to the shipper. Now let us assume that a shipment of perishable produce arrives in a damaged condition. The market value of this produce for the purpose of a claim is not what some one would pay for it, because this is the gross amount. The market value of this shipment would be the net amount realized because that is what the shipper would obtain. Let us assume that a carload of cantaloupes arrives in a damaged condition. Now it costs, say $40 to repack them, $20 to cart them to the auction house, and they sell for $150, out of which the commission merchant will get a commission of ten per cent or $15. Now assume that they were invoiced for $250 to the consignee and that the consignee would have taken them had they arrived in good condition. The measure of damages is not the difference between the $150 the cantaloupes brought on the open market and the $250 which they were invoiced at, or $100. The measure of damages is the difference between the value of the cantaloupes in their damaged condition when they arrived and their actual value had they arrived in good condition. Now, obviously, this cannot be obtained in any

is that if a claimant's efforts in tracing are made in good faith sult in handling the shipment to the best advantage possible pense may be recovered, otherwise not.[28a] But where paper

manner than by deducting he $150 for them the mission, plus the $40 repack- harge, plus the $20 cartage, ould make $75 for their value lamaged condition, or make nant's claim $175 instead of he important thing to keep in that no matter how arrived easure of damages is always rence between the full actual the shipment in good con- t destination, at the time it ave arrived, and its full ac- ue when it did arrive in the a in which it did arrive.

per cannot recover as dam- r injuries to live stock in an amount alleged to have pended for medicines and the absence of showing that nount was reasonable and y. Panhandle & S. F. Ry. orton (Tex. 1916), 188 S. W.

suit for damages and to re- penalty for the violation of . 1911, arts. 6670, 6671, for and wrongfully refusing to goods consigned to plain- connecting carrier, and for them beyond the connect- it, plaintiff's profits on the of goods sold were not a measure of damages, where it appear that such profits were a refusal to deliver them he statutory time. Quanah, '. Ry. Co. v. Moore (Tex. 39 S. W. 322.

case, tried by the court, it be presumed that the court improperly allowed plaintiff's profits as damages, where there was no evidence to show that such profits were in fact lost to plaintiff. Quanah, A. & P. Ry. Co. v. Moore (Tex. 1916), 189 S. W. 322.

Where a shipment of live stock is injured by the carrier's negligence, the shipper must use all reasonable means at his command to lessen the damages which would otherwise result from such negligencee, and his failure to do so will limit his recovery to such damages as would have resulted from such negligence, had such means been used. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

In an action for damages to a shipment of live stock, the increased expense in caring for the stock for the purpose of recuperation could not be recovered in addition to loss from shrinkage, as it would be double damages. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189, 765.

It must be remembered, however, that it is the duty of the carrier to trace goods when so requested by the shipper. Cleveland, etc., R. C. v. Freiberg, 11 O. C. C. (N. S.), 241, 20 O. C. D. 669, affirmed in 83 O. St. 482, Herf, etc., Chemical Co. v. Lackawanna Line, 70 Mo. App. 274; Central, etc., R. Co. v. Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817; Savannah, etc., R. Co. v. Elder 116 Ga. 942, 43 S. E. 379; Davis v. Seaboard, etc., Railway, 136 Ga. 278, 71 S. E. 428.

28a. Emery & Co. v. Chicago, B. & Q. R. Co. (Ia. 1918), N. W. 540.

was damaged during shipment so as to be worthless except as waste paper and the shipper reconditioned the paper so that its value after deducting cost of reconditioning was greater than its value as waste paper, the cost of reconditioning was properly charged to the carrier.[28b]

9. **Damages for Partial Loss Under an Agreed Valuation.** It may be stated as a rule which has very generally received judicial approval, that where there is a partial loss to a shipment shipped under an agreed valuation, the carrier is always liable for such loss up to the agreed value even if the shipment in its entirety as damaged is worth more than the limited liability. Thus the stipulation in a contract of live stock shipment that the value of each animal does not exceed $100, and the carrier's liability for any loss or damage shall not exceed such valuation, does not prevent recovery where an animal is after its injury worth $100, but merely limits to such amount the recovery of damages measured by the ordinary rule of difference in market value with and without the injury.[29]

28b. Olcovich v. Grand Trunk Ry. Co. of Canada (Cal. 1918), 176 Pac. 459.

29. Illinois Cent. R. Co. v. H. E. Wilson & Co. (Tenn. 1915), 176 S. W. 1036; N. & W. Ry. v. Steele (Va. 1915) 86 S. E. 124; Ficklin v. Wabash Co. 117 Mo. App. 211, 93 S. W. 861; Starnes v. L. & N. Ry., 91 Tenn. 516, 19 S. W. 675; C. of G. Ry. v. Broada (Ala. 1914), 67 So. 437.

Under a contract for the carriage of cattle limiting the carrier's liability to the valuation declared by the shipper, the rate charged being based on such valuation, the liability was not based on such valuation, but only limited to such valuation, and the measure of damages was the amount of actual damages from the carrier's negligence, in no case to exceed the sum stipulated. Greening v. Chicago & N. W. Ry. Co. (Mo. 1916), 183 S. W. 1121.

Where bill of lading for an interstate shipment of live stock, in consideration of reduced rate, limited the liability of the carrier to $100 for each horse or mule, such limitation does not, where horses and mules were injured, preclude recovery of damages, although the animals, despite the injury, were worth more than $100 a head. Washington Horse Exchange v. Louisville & N. R. Co. (N. C. 1916), 87 S. E. 941.

A contract of shipment of live stock, agreeing that the value of the live stock should not exceed $30 per head, and that in no event should the carrier's liability exceed $1,000, permits the shipper to recover actual damage up to the amount named, and not merely the proportion of the amount named which the dam-

age bears to the actual value of the stock. Castner v. Oregon-Washington R. & Nav. Co. (Wash. 1916), 155 Pac. 167. Cincinnati N. O. & T. P. Ry. Co. v. Smith & Johnston (Ky. 1915), 176 S. W. 1013, 1014.

But it also has been held that under a contract for interstate carriage of horses, conditioned, in consideration of the lower tariff, that the carrier assumed liability to the extent of the recited agreed valuation, the shipper is not entitled to recover the entire loss, because less than the amount limited nor is the carrier free from liability because the horses in their injured condition are worth more than the agreed valuation, but the shipper is liable for such proportion of the actual loss as the declared valuation bears to the actual value. Frank v. Michigan Cent. R. R. Co., 154 N. Y. S., 701. And see Duplon Silk Co. v. L. V. R. R. 223 Fed. 600.

Under a bill of lading fixing live stock value and limiting recovery to that sum, the shipper can recover any damage less than such valuation which resulted from delivery of other and inferior stock, although he realized on the market more than such valuation. Chesapeake & O. Ry. Co. v. Rebman & Clark (Va. 1916), 90 S. E. 629. A paragraph of the contract providing that in case plaintiff's stock were damaged he cannot claim an amount exceeding the stipulated value of the stock, which was $30 per head, pleaded as a defense, will not defeat a recovery of damages for injury to the cattle, or support the contention that their value must be reduced below $30 per head before recovery can be had for an injury. Atchison, T. & S. F. Ry. Co. v. Smyth (Tex. 1916), 189 S. W. 70.

In a suit for damages to 1,000 bushels of shipped corn, it is error to allow recovery of damages, although actually suffered, of 18½ cents on every bushel, where the shipper admitted that after the shipment his customer accepted and paid for 367½ bushels at the full price agreed, although the customer claimed damages. Houston & T. C. Ry. Co. v. Lewis (Tex. 1916), 185 S. W. 593.

Under a bill of lading stipulating that in case of total loss of any live stock covered by the contract for which the carrier should be liable the value was the actual cash value at the time and place of shipment, in no case to exceed $10 for each calf, and that in case of injury or partial loss the amount claimed should not exceed the same proportion, a recovery on findings of the jury that there was a depreciation of 5 per cent. on the valuation of $30, or $1.50 per head, limited the shipper's recovery to 5 per cent of the agreed valuation, or 50 cents per head. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

Where a contract for the shipment of live stock fixed the maximum recovery of $30 per head for cattle injured or lost, a recovery for injuries may be had, though the value of the animals after the injuries exceeded the value fixed; the provision not fixing the maximum value for death and a proportional recovery for injuries. Southern Pac. Co. v. Stewart, 233 Fed. 956.

A recovery at the ratio of $100 per ton for the lost freight is the limit of the damages recoverable for the

10. Limitation of Liability in Case of Fire. The general principles covering damages through loss by fire have been discussed elsewhere. (Ch. IV.) While the bill of lading contains a

loss of a part of an interstate shipment of 25 tons of copper, under a bill of lading which contains a released-valuation clause of $100 per net ton, based upon a difference in the carrier's freight rates on file with the Interstate Commerce Commission. Western Transit Co. v. Leslie & Co., 37 Sup. Ct. 133.

A provision, in a contract for the shipment of live stock in consideration of a reduced rate, that in the event of damage for which the carrier might be liable claim should not be made for any amount in excess of the actual value of the animals damaged at the time and place of shipment, nor in any event in excess of $3 per head, did not estop a shipper who realized more than $3 per head for all his sheep and lambs involved in the case from recovering on a claim for damages less than that valuation. Baird v. Denver & R. G. R. Co. (Utah 1916), 162 Pac. 79.

In a damage action against a live stock carrier, the valuations contained in the schedules govern the damages for killed stock, and recovery for injuries to other stock must be in the ratio of the stipulated to the real value. Dickerson v. Erie R. Co. 169 N. Y. S. 5.

A limitation of liability in a live stock contract does not prevent the claimant from recovery in case of partial loss up to the limited amount and he is not restricted to the proportion that the partial loss bears to the total value. Chicago, I. & L. Ry. v. Priddy (Ind. 1917), 115 N. E. 266, 270.

The measure of damages for garlic injured in shipment was the difference between what shipper would have received under the contract of sale and what he did receive by reason of the sale of the goods in their damaged condition through his commission merchant. C. R. I. & P. Ry. Co. v. Burkholder & Tuggle (Ark. 1917) 195 S. W. 1073.

Where goods are shipped under a released valuation and are not totally destroyed, the general rule is that the claimant can recover for the injury up to the stipulated amount, even though the goods, after such injury, are worth more than the released valuation.

Under a live stock contract limiting liability to $100.00 each to horses where it appears injuries to stallions were equal to that amount, claimant can recover such amount. Wooster v. Chicago & N. N. W. Ry. Co. (Wisc. 1918), 166 N. W. 431.

In some jurisdictions, however, it is held that the recovery must be in the ratio that the released valuation bears to the real valuation.

In Dickerson v. Erie R. Co., 169 N. Y. S. 5, the court held that where horses are shipped under a released valuation of $100 each, and two of the horses die and others are injured, the claimant can recover $100 for each of the dead horses, but for the injured horses the recovery must be at the ratio of the stipulated to the real value. This latter holding seems to be against the weight of authority. If the injury to the horses amounted to $100 each the shipper is entitled to recover that amount.

provision limiting liability in case of fire, this limitation has not yet been construed with reference to the Cummins Amendment. However, it was held that a provision in the bill of lading by which the carrier limits its liability against loss by fire not attributable to its negligence is valid under the Carmack Amendment. [32]

11. Invoice Price Under Bill of Lading. As has already been pointed out, this section of the bill of lading is void under the Cummins amendment, and has been so held by a federal court as well as by the Interstate Commerce Commission. It might, however, be stated that, under the weight of authority, this provision was valid with respect to claims that arose prior to June 2, 1915, but not with respect to claims that have arisen since then. However, the carriers contend that this is the legal measure of damages and refuse to adjust claims on any other basis. It is to be hoped that the Supreme Court of the United States will eventually render a decision that will authoritatively determine the matter.[33]

32. C. of Ga. Ry. Co. v. Patterson (Ala. 1915), 68 So. 513, 514.

33. On a shipment made prior to the Cummins Amendment it was held that a shipper, who had purchased a soda fountain for $100, the actual value of which was $250, could recover only the cost to him. Wilson v. C. G. W. R. R. (Mo. 1916), 190 S. W. 22.

Where the catalogue of a mail order company, giving premium merchandise as a bonus with purchases, disclosed that such premium merchandise had a fixed cash price, and that customers understood and paid it, such premium merchandise had an invoice price within the uniform bill of lading adopted by agreement of the Interstate Commerce Commission with the various railroads of the country, which provides that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to consignee, including the freight charges, if prepaid); "invoice price" being the amount at which goods are invoiced to the purchaser, the cost or value of the property at the shipping point. Larkin Co. v. N. Y. C. & St. L. R. Co., 162 N. Y. S. 870.

"Invoice price" is the amount at which the goods are invoiced to the purchaser, the cost or value of the property at the shipping point. 23 Cyc. 352; Pierce v. Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 877, 52 Pac. 302, 40 L. R. A. 350; Le Roy v. United Insurance Co., 7 Johns. 343, 353. Larkin Co. v. N. Y. C. & St. L. R. Co., 162 N. Y. S. 870, 871.

This seems to have been also true with reference to some intrastate shipments. Wilson v. C. G. W. R. R. (Mo. 1916), 190 S. W. 22.

12. **Goods Hidden from View.** Between June 2, 1915, and August 9, 1916, the Interstate Commerce Commission was given power to authorize the filing of released rates in cases where the goods were hidden from view. It will be recalled that the original Cummins Amendment, after invalidating all limitations of liability, contained the following proviso: "Provided, however, that if the goods are hidden from view by wrapping, boxing or other means and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules. Provided, further, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law." In the proviso "that if the goods are hidden from view by wrapping, boxing or other means, and the carrier is not notified as to the character of the goods," the shipper may be required to state their value in writing and the carrier only be liable for such value, what is the proper interpretation to be placed upon the words "and the carrier is not notified as to the character of the goods"? Some argue that the word "character" means nothing more than a statement of the ordinary name by which the commodity is known. On the other hand, it is urged that knowledge as to what the commodity is is necessary in order to apply to it any transportation rate, and that therefore the word "character" properly means more than the mere name of the commodity. It has been suggested that the real and proper meaning would be indicated by recasting the language as follows: "Provided, however, that if a commodity in the course of transportation is hidden from view by wrapping, boxing or other means so that the carrier cannot know its character, that is to say, its grade, quality and condition, it may, with the approval of the Commission, publish and maintain rates based on value and require the shipper to state in writing the value of any shipment made, and beyond the value so stated the carrier shall not be liable." It has also been suggested that,

in view of the fact that the articles dealt with in this proviso are to be distinguished on the basis of value, the value becomes a peculiar quality of the property and the word "character" should be construed as including value, and that when the shipper notifies the carrier of the character of the goods the notice is incomplete unless the value is stated as a necessary element in pointing out the character of the goods. Another suggestion is that when common experience or knowledge does not clearly establish the nature of the goods, or the view is hidden by boxing, wrapping or other means, and the carrier is not notified as to the true character of the goods, it may exercise the right to require the shipper to state in writing the value of the property. The right of the carrier to initiate its rates and to consider value of the property tendered for transportation as an element in determining the classification thereof, or the rate applicable thereto, has not been denied by the act or withdrawn by this amendment. The right in certain instances to make varying rates upon a given article or commodity dependent upon its true value being recognized, and it being impossible for the carrier's agent to know the true value of the shipment unless it is declared by the shipper, and in view of the fact that the ordinary name of the commodity is essential to the application of any transportation rate whatsoever, it seems that the word "character" as used in this proviso must include the true and actual value as stated by the shipper. The word "character" as here used clearly relates primarily to value or to those qualities affecting value, and when the entire proviso is considered the meaning seems to be that if the qualities affecting value of the goods are hidden from the carrier's view, or are not known to the carrier, the proviso applies. It is a well settled rule of statutory construction that the word "and" may be read as "or" in deference to the meaning of the context. If the word "and" in the proviso is read as "or," the meaning is reasonably clear, whereas if the letter of the statute is adhered to the meaning is doubtful and difficult to determine. In those instances in which the carrier desires to limit its liability to the value of the property as specifically stated in writing by the shipper, the rate must be based upon the declared value, and be so published; but the Commission apparently must determine in advance of such publication that the commodity is one the

value of which cannot be known to the carrier from ordinary sources or reasonable inspection and to which rates based on declared value may be applied in connection with which the carrier's liability is limited to the value so declared. In determining that question, the inquiry is whether or not the commodity is one the value of which is peculiarly within the knowledge of the shipper. If it has a definite market value, or its value depends upon facts of which the carrier has equal knowledge with the shipper, the "character" of the shipment is known to the carrier, and the proviso does not apply. Congress did not affirmatively recognize any rates based upon declared value other than those authorized by this proviso. This, of course, does not mean that commodities may not be reasonably classified according to value and be subject to different rates applicable to different grades of the same commodity, which is a different matter from limiting the liability to the declared value. When the goods are not hidden from view and the carrier is advised as to their character, all contracts or agreements purporting to limit the liability of the carrier for loss or damage by it are made void. A carrier, since the Cummins Amendment is in effect, may not contract to limit its liability for loss or damage caused by it to the property. There is, however, no inhibition as to the limitation of the liability of a carrier for losses not caused by it or a succeeding carrier to which the property may be delivered. The amendment has expressly reapplied the limitation of the prior act with respect to loss or damage caused by the carriers chargeable therewith. It follows, therefore, that the interpretation applied to the act before it was amended is equally applicable to the amendment in so far as the latter affects the right of a carrier to establish rates conditional upon the shipper's assumption of the entire risk of loss attributable to causes beyond the carrier's control. From this it follows that under the amendment a contract or a tariff may lawfully limit to a reasonable maximum the liability af a carrier for losses which it does not cause. It follows further that the rates provided by such tariff may be proportionate to the risk assumed. This provision of the statute as to goods concealed from view and of the character of which the carrier is not advised clearly prescribes the right of carriers, under the direction or approval of the Commission, to provide for a graduation of rates in accord-

ance with the declared value of the property transported. The liability provided by the rates so established by the Commission is applicable no less to instances of loss or damage chargeable to the negligence of the carrier than to those occasioned by causes beyond the carrier's control. But the carriers may not contract to limit their liability for loss, damage or injury caused by them to property the character of which is manifested by the shipment itself or otherwise disclosed. In this connection, it has been suggested that the carrier might provide that in the event the shipper refused to declare the value the higher rates would apply. This suggestion cannot be approved. If the rate is lawfully conditioned upon the value as declared by the shipper, it is as much the shipper's duty to declare the true value of the shipment as it is his duty to declare the name of a commodity tendered for shipment, as to which there are no different rates. It is important to keep in mind that the carriers are not prohibited from making different rates dependent upon the values of different grades of a given commodity; that, except as covered by the Cummins Amendment, including approval of the rates by the Commission, the carrier is subject to all of the liabilities imposed by that amendment; and that if, in any instance, the shipper declares the value to be less than the true value in order to get a lower rate than that to which he would otherwise be entitled, he violates and is subject to the penalty prescribed in Section 10 of the act. The carrier would also be subject to the same penalty in such case if, having knowledge that the value represented is not the true value, it nevertheless accepts the shipper's representation as to value for the purpose of applying the rate.[35]

13. **Rough Handling in Transit.** The fundamental and controlling principle as to damages allowable for injury to personal property is that the injured party shall have actual pecuniary compensation for the injury received, so that he may be placed as nearly as may be in the condition which he would have occupied but for the injury.[36] Since the Cummins Amendment has abolished all limitations of liability except in case where authorized by the Commission, and baggage, the decisions concerning

35. The Cummins Amendment, 33 I. C. C. 682.

36. H. & T. C. Ry. Co. v. Lewis (Tex. 1916), 185 S. W. 593.

the general rules as to the measure of damages, irrespective of any limitation of liability are those which are of value at the present time. The measure of damages to a shipper of goods damaged by the negligence of a carrier in handling at destination is the difference between the market value, at destination, of the goods in the condition in which they were when shipped and such value in the condition in which they were delivered.[37] Although every element of the carrier's liability for damages to onions in transit is satisfactorily proved, the shipper cannot recover if he fails to produce competent proof of the market value of the onions on delivery, as a basis for measuring damages.[38] Where goods are injured in trnsit from causes for which the carrier is responsible, the consignee's damage is the difference between their reasonable market value on arrival in the condition they then were in and what should have been their reasonably fair value on arrival but for the injury.[39] In an action against a carrier for injury to a mule in transporation, caused by the defendant's negligence, the plaintiff is entitled to recover the difference between the market value of the animal at the time and place of delivery, in the condition it was delivered, and its market value at such time and place in the condition that with ordinary care it should have been delivered, with legal interest, which interest is recoverable as a part of the damage.[40] The action being for injury to freight, and not conversion thereof, by the carrier, and the evidence showing it was rendered worthless, the measure of damages is the market value at time and place of tender.[41] A carrier of live stock, in the absence of any special contract, is liable for the full amount of its depreciation

37. Greenwald v. N. Y. C. & H. R. R. Co., 159 N. Y. S. 15.

The measure of damages for negligent injury of cattle in transit is the same whether they are for immediate sale on the market or for pasture. Panhandle & S. F. Ry. Co. v. Norton (Tex. 1916), 188 S. W. 1011.

38. William R. Hankoff, Inc., v. Erie R. Co., 161 N. Y. S. 346.

An admission of the carrier's counsel as to value of onions when frozen is not a proper basis for damages, where they were sold for a higher price. William R. Mankoff, Inc., v. Erie R. Co., 161 N. Y. S. 345.

39. Whittington v. So. Ry. Co. (N. C. 1916), 90 S. E. 505.

40. Ft. W. & R. G. Ry. Co. v. Albin (Tex 1916), 185 S W. 647.

41. St. L., S. W. Ry. Co. of Texas v. Hughston G. Co. (Tex. 1916), 186 S. W. 429.

caused by its negligence.[42] The carrier, when sued for injuries to cattle in transit, may offer evidence of improvement of such cattle or recovery from their injuries, not for the purpose of showing that there were no damages, but to show the extent of the injury to the cattle at the time of their arrival, and the resulting damages.[43] In a suit for damages for alleged negligent injury to live stock in transit, a charge to consider the extent of recovery of the cattle from their injuries and, if recovery was complete, to find for the carrier, is not objectionable as confining consideration to complete recovery.[44] In a suit to recover damages for alleged negligent injuries to cattle in transit, a charge to find for the carrier if the cattle entirely recovered and were of equal value to that before shipment, while erroneous, since the shipper would be entitled to damages as of the date of delivery, cannot be complained of by the carrier.[45]

14. **Special Damages.** One phase of law which has caused more or less confusion has been the recovery of special damages. Thus a contractor holds men at a point awaiting the arrival of construction material which is delayed in transit. He has gone to considerable expense in the matter, but cannot recover the wages of his men which accrued while waiting for the material to arrive. This is so because such wages are in the nature of special damages which cannot be recovered unless the carrier had notice before it accepted the shipment that such damages might accrue as the result of its negligence. The rule has therefore been laid down to be that in the absence of notice to the carrier special damages cannot be recovered. Therefore, where a carrier unreasonably delays a shipment of cotton ginning machinery during the ginning season, it is not chargeable with implied notice that the consignee was going to operate a public cotton gin, and he therefore cannot recover profit on the cotton which he might have gained had the machinery arrived on time.[46]

42. K. C., M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

43. Panhandle & S. F. Ry. Co. v. Norton (Tex. 1916), 188 S. W. 1011.

44. P. & S. F. Ry. Co. v. Norton (Tex. 1916), 188 S W. 1011.

45. P. & S. F. Ry. Co. v. Norton (Tex. 1916) 188 S. W. 1011.

46. I. C. R. Co. v. Brothers (Ala. 1915), 67 So. 628, 629.

However, profits may be recovered as damages, but such profits must be alleged and proved. In order to recover, it was necessary to prove that the shipper would have made a certain amount of profit on the shipment had it not been negligently held by the carrier, and that the carrier knew the purpose for which plaintiff had ordered the shipment. These facts being necessary to establish the liability of the carrier, it was equally necessary that they should have been alleged.[47] In another case, a grower of rice purchased coal for fuel for an engine which he used to pump water for his growing crop. Owing to a delay in transportation, the fuel arrived so late that his crop was ruined. While the freight was at an intermediate station, he notified the carrier what he wanted it for and asked it to hurry up the shipment, which it did not do. It was held that, since notice that special damages would accrue was not given until after the shipment had moved, they were not recoverable.[48] This is because notice or information of circumstances, whereby special damages might arise, given after the contract was made and during the period of transportation, is not sufficient to charge the carrier with liability for such special damages.[49] So, a buyer of coal for use in running an engine pumping water for his growing rice cannot recover from the carrier special damages for delay in transporting the coal causing loss of his crop, in the absence of any notice of special damages given prior to or at the time of the contract of shipment, though notice was given during the delay and while the car of coal was standing at a way station, and though the buyer requested the seller to hurry up the shipment, which request was communicated to the carrier's agent.[50] But it has also been stated that there may be a recovery for special damages arising on account of negligent delay in making a delivery after the transported article has reached its destination, if notice was given after the arrival of the article at destination.[51] Where the proximate result of the delay is the loss of the use of the goods,

47. Foster v. I. & G. N. Ry. Co. (Tex. 1915), 175 S. W. 762, 763.

48. C. R I. & P. Ry. Co. v. Thomas (Ark. 1915), 176 S. W. 681.

49. C. R. I. & P. Ry. Co. v. Thomas (Ark. 1915), 176 S. W. 681.

50. C. R I. & P. Ry. Co. v. Thomas (Ark. 1915), 176 S. W. 681.

51. C. R. I. & P. Ry Co. v. Thomas (Ark. 1915), 176 S. W. 681.

and the carrier has notice or knowledge of facts that would apprise it the consignee would sustain loss in that particular, the measure of damages is the value of the use of during the time of delay. Such has been held to be the ordinary damages where the goods consist of machinery ordered for use and not for resale, and in cases where a passenger sues the carrier for delay in delivering his baggage.[52] But it has been held that, while a carrier is liable for deterioration in goods unreasonably delayed, it is not liable for special damages not contemplated at the time of shipment; such as deterioration in eggs because of delay in a shipment of material to be used in constructing egg packing boxes.[53] Under certain circumstances, damages may be recovered as within the contemplation of the parties, though they are in excess of those which would ordinarily be considered the natural and probable consequences of the default of the carrier. In all such cases the carrier must have had notice of the special circumstances which would likely give rise to the damages. And this notice should be given when the goods are delivered for transportation. Subsequent notice, however, of the effect of further delay after the goods should have been delivered may render the carrier liable for damages accruing after that time by reason of his negligence in not tracing and finding the goods.[54] So, in an action for damages occasioned by unnecessary and unreasonable delay in the shipment of freight, only such damages may be recovered as were contemplated, or might reasonably be supposed to have entered into contemplation of the parties to the contract of carriage, and if the shipper expects to charge the carrier with any special damages he must communicate to the carrier, at or prior to the time of shipment, all the facts and circumstances of the case which do not ordinarily attend the carriage of such freight, or the peculiar character and value of the property carried; otherwise, such peculiar circumstances cannot be contem-

52. 6 Cyc. 449; 5 Ruling Case Law, 23, sec. 833; Illinois Cent. R. Co. v. Brothers, 67 South. 628, and authorities supra; L. & N. R. Co. v. Cheatwood (Ala. 1915), 68 So. 720, 721.

53. Southern Ry v. Moody, 169 Ala. 294, 53 So. 1016.

54. I. C. R. Co. v. Brothers, 67 So. 628; 6 Cyc. 450; Southern Ry. Co. v. Lewis, 165 Ala. 451, 51 So. 863; L. N. R. Co. v. Cheatwood (Ala. 1915), 68 So 720, 721.

plated by the carrier.[55] And prospective profits cannot be recovered unless by the terms of the contract, or by direct notice, they are within the expectations of the parties, so that it plainly appears that they were within the contemplation of the parties when the contract of shipment was made.[56] One seeking to recover special damages for breach of contract must show that such damages were within the contemplation of both parties to the contract; otherwise, he can only recover such damages as in the usual course of things flow from the breach.[57] So, when certain dresses which were to be sold at retail were negligently delayed in transit, loss of profits could not be recovered unless specially pleaded.[58] So, where damages for failure to furnish cars to transport lumber are special in their nature, and not such as would usually and probably result from delay in the transportation of timber, a carrier could not be held liable for such damages because it had no notice they would result.[59] Therefore, if special damages, such as profits, are sought, there must be allegation and proof of such special damages.[60] But the carrier is liable for special damages resulting from delay where it has notice that such damages will occur.[61] And there may be a recovery for special damages aris-

55. M. K. & T. Ry. Co. v. Foote (Okla. 1915), 149 Pac. 223.

In an action against a carrier for failure to deliver a shipment of sugar, evidence where it is shown the carrier knew that the sugar had either been resold or was for immediate sale and that prompt delivery was most important, and so consequential damages, as loss of profits on resale, may be recovered. Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co. (Mo. 1916), 184 S. W. 915, 916.

56. Central Trust Co. v. Savannah & W. R. Co. (C. C.), 69 Fed. 683; Foster v. Cleveland, etc., R. R. Co. (C. C.), 56 Fed. 434; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Katz v. C. C. C. & St. L. R. R. Co., supra, and cases there cited; and Rosenberg v. D. L. & W. R. Co., 88 Misc. Rep., 1, 150 N. Y. S. 75; Detmer-Wallen Co. v. D. L. & W. R. Co., 153 N. Y. S. 288, 289.

57. M. K. & T. Ry. Co. v. Foote, (Okla. 1915), 149 Pac. 223.

58. Foster v. I. & G. N. Ry. Co., (Tex. 1915), 175 S. W. 762, 763.

59. Calvit v. McFadden, 13 Tex. 324; Express Co. v. Darnell, 62 Tex. 640; Railway Co. v. Belcher, 89 Tex. 428, 35 S. W. 6; Beamont, S. L. & W. Ry. Co. v. Moore, (Tex. 1915), 174 S. W. 844, 847.

60. Foster v. I. & G. N. Ry. Co., (Tex. 1915), 175 S. W., 762, 763.

61. Armstrong v. C. M. & St. P. Ry. Co., (S. D. 1915), 152 N. W. 696, 697.

ing on account of negligent delay in making a delivery after the transported article has reached its destination, if notice was given after the arrival of the article at destination.[62] Of course, the carrier is not liable for any damages except such as naturally would be expected to arise as the result of its negligence. It is therefore not liable for special damages unless it is especially notified that such damages will occur. Where a cotton buyer of limited means and credit, having purchased 47 bales of cotton to fulfill his contract for future delivery of 100 bales, informed the agent of the railroad by which he shipped out the 47 bales that he was loaded up with 150 bales in the town and if he did not get the 47 bales shipped through immediately he would be blocked off from doing any business, there was not sufficient notice to the road to warrant the buyer recovering against it, for a delay of delivery, special damages on account of the suspension arising from his inability to move out some of the cotton he had on hand, his line of credit being exhausted.[63] Special damages can only be

62. C. R. I. & P. Ry. Co. v. Thomas, (Ark. 1915), 176 S. W. 681.

63. Y. & M. V. R. Co. v. Jacobson, (Miss. 1916), 72 So. R. 889.

Where losses and injuries are not a necessary, or a usual and ordinary, but a proximate though unusual, result of actionable negligence, such losses and injuries may be compensated for by the recovery of special damages; but the negligent party cannot lawfully be made to respond in damages for losses that do not usually result from or could not ordinarily have been foreseen as a proximate result of a particular negligence, unless it be shown that there was knowledge or notice on the part of the negligent person that such losses would or might follow as a proximate result of a particular negligence. Florida East Coast Ry. Co. v. Peters, (Fla. 1916), 73 So. 151.

It is doubtless true that common carriers are supposed to take notice of such natural events as are familiar to ordinary people. They will be held to a knowledge of seedtime and harvest, and of the general customs relating thereto in the territory where they do business. Even so, knowledge by a carrier of the fact that a shipper on its line has about 400 acres planted in tomatoes would not carry with it the additional knowledge when such tomatoes would be ready for the shipment thereof to begin or when the shipper would need crates, the number thereof that he would need, or that a few days' delay in the transportation thereof would result in special damages to such shipper. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

In action by a consignee against a carrier for the recovery of damages occasioned by negligent delay in the transportation of crate material, un-

less the carrier had at or before the receipt of the crates for transportation knowledge or notice of the particular special damages that would result from an unreasonable delay in the transportation, such special damages are not recoverable; and, if several elements of unusual or special damages would proximately result from the negligence, there must have been notice or knowledge as to each element of damages as a probable result of the stated negligence before liability for such special damages arises in law. Where notice was given to the carrier of probable special damages as a result of unreasonable delay in transporting crate material after some shipments of such crate material had already been delivered to the carrier, such notice cannot be held to relate back, and the carrier would be liable only for special damages as for shipments received after such notice was given to it. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

Where by reason of unreasonable delay in receiving material a contractor who is building a dam across a river was delayed eleven months in the completion of the contract and lost some $30,000 in profit, owing to the extra expense he was put to, and where the carrier had notice that unless such shipments were promptly transported severe loss would result, the contractor is entitled to recover such special damages. Gulf, C. & S. F. Ry. Co. v. Nelson (Tex. 1917), 192 S. W. 1056. Also Lee Rawls v. A. C. L. R. R. (N. C. 1917), 91 S. E. 367.

In an action against a carrier for the recovery of damages occasioned by the negligent delay in the transportation of goods, whether brought by the consignor or consignee, only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. In order to charge the carrier with any special damages, it is incumbent upon the plaintiff to show that at the time of the shipment of the goods the carrier had notice or knowledge of such special facts and circumstances as to require expedition in the transportation of the goods, and that special damages would ensue by reason of negligent delay. Florida East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

A well-drilling company was compelled to suspend operations because it found itself short of certain machinery. It ordered this machinery to be shipped to it from another point and notified the agent of the delivering carrier where it was working that it would have to have such machinery quickly or it would be compelled to cease operations. This state of facts the delivering carrier failed to forward to the initial carrier, a connecting line. The shipment arrived several weeks late, whereas two days was a reasonable time for transportation. Held that the well-drilling company was entitled to recover the usual or rental value of the machinery during the period of the delay, together with such reasonable expenses as might be incurred by it in storing, for recovery or endeavoring to secure delivery, but that its notice given to the delivering carrier was not sufficient to charge the initial carrier with special damages when it had not received such notice. Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co. (Okla. 1917), 165 Pac. 1133.

recovered where notice that such damage will result has been given to the carrier. If given, such damages can be recovered.[64] Although rare, there are many cases in the books where a common carrier has been sued for damages for failure of live stock to reach an exhibition in time, whereby the owner was deprived of a chance to compete for a prize.[65]

The connecting carrier cannot be held liable for special damages accruing to the owner by virtue of the nondelivery of a shipment, where the notice or special instructions given by the shipper to the initial carrier have not been communicated to the connecting carrier. Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co. (Okla. 1917), 165 Pac. 1133.

Before a judgment can be rendered against the initial carrier for special damages on account of its failure to communicate a notice or special instructions to the connecting carrier, there must be some evidence tending to show that its failure to communicate said notice received by it from the shipper was the immediate cause of the delay, or, in other words, the delay must be the proximate result of the failure to deliver such notice. Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co. (Okla. 1917), 165 Pac. 1133.

64. Quannah A. & P. Ry. v. Bone (Tex. 1917), 199 S. W. 332.

65. General notice to the carrier that hogs are to be transported for exhibition purposes is sufficient to authorize recovery of damages for loss of prize money caused by delay in transportation. Although a state shipment was involved, the law as stated by the court seems supported by the weight of authority. K. C. M. & O. Ry. Co. v. Bell (Tex. 1917), 197 S. W. 322.

Under a joint contract for shipment of hogs knowledge of one carrier that they are for exhibition purposes binds the other. K. C. M. & O. Ry. v. Bell, supra.

But in the absence of notice that hogs are intended for exhibition purposes, carrier is not responsible in damages for loss of prize money caused by delay in transportation. K. C. M. & O. Ry v. Bell, supra.

In an action for damages for delay in transportation of hogs intended for exhibition purposes, evidence tending to show probability of plaintiff having been successful competitor for prize money is admissible. K. C. M. & O. Ry. v. Bell, supra.

Evidence that hogs delayed in transportation and intended for exhibition purposes would have taken first premium was properly excluded as stating a conclusion. K. C. M. & O. Ry. v. Bell, supra.

In K. C. M. & O. Ry. Co. v. Bell (Tex. 1917), 197 S. W. 322, the court said, pp. 332, 323:

"An analysis of the authorities on this question may be found in Sutherland on Damages (4th Ed.) § 71. According to this authority, it is now the rule in England, established by the case of Chaplin v. Hicks (1911), 2 K. B. 780, that, where one by the wrongful act of another is deprived of the opportunity of competing in a contest where prizes are to be awarded to successful contestants, he may recover the value of the oppor-

15. Interest on Claims. On account of the long period of time loss and damage claims frequently pend, sometimes for several years before decisive action is taken by the carriers, and then suit dragging along several years more, the collection of interest on claims becomes important. Generally the collection of interest depends upon the statutes of the particular state and hence any general rule must be considered in the light of such a situation. It has been stated, interest may be recovered in cases where the suit proceeds on the common-law liability of the common carrier for the loss of property in its possession for transportation, if other elements of liability are present. Indeed, such seems to be the general rule on the subject. It is well

tunity to compete. In the case of Adams Express Co. v. Egbert, 36 Pa. 360, 78 Am. Dec. 382, it was recognized that the plaintiff, in a proper case, might recover the value of his opportunity to compete, where by wrongful act the defendant deprived the plaintiff of this opportunity. In the case of Ft. Worth & Denver City Ry. Co. v. Ikard Co., 140 S. W. 502, where the plaintiff had recovered $110, 'for damages sustained in the loss of prizes which it was claimed the cattle would have taken,' it was held that:

" 'Under the pleadings and evidence the defendant was not entitled to recover the damages for loss of prize money.'

"In the case of Western Union Telegraph Co. v. Crall, 39 Kan. 580, 18 Pac. 719, it was held that:

" 'No damages ought to have been allowed, based upon the probability of the horse being able to win prizes in trotting races.'

"Frequently preparations are made at considerable expense for entry in exhibitions and contests, where prizes and premiums are to be awarded, and it appears to us that the chance which a competitor has of being awarded a prize or premium in such contest is a right which may be of value, and that one wrongfully impairing or destroying such right ought to be held liable therefor in damages.

"It is true that it is difficult to determine the value of this chance, but ordinarily difficulty in ascertaining the amount of damages resulting from the violation of a right is not an insuperable obstacle to recovery. The chance might be worth little or nothing, or it might be worth, under some circumstances, the full amount of the premium offered for the best of the class in which plaintiff was to be a competitor. In such a case, evidence as to all such matters as would tend to show the probability that the plaintiff would be successful in the competition would be admissible, and, as one of the judges in the English case says, it would then be left to the good sense of the jury trying the case to determine the value of the plaintiff's chance in the competition. If any recovery in such cases can be had at all, it would evidently be only on this theory, and not on the theory on which plaintiff proceeded in this case."

settled (aside from any provision in the bill of lading) that the measure of the damages for the loss of the goods by the carrier, when he is liable for such loss, is generally the value of the goods at the destination to which he undertook to carry them, with interest on such value from the time when the goods should have been delivered, deducting, however, the unpaid cost of transportation, but adding such incidental damages as naturally and proximately flow from the loss. This, at least in the great majority of cases, will be the extent of the loss of the shipper, and of the compensation for its breach, which it may be reasonably supposed was in the contemplation of the parties at the time of the making of the contract. In certain states interest is recoverable in cases of this character as a matter of right. Generally speaking, such interest is to be recovered from the time the property should be delivered at point of destination. However, where the suit is instituted subsequent to that time, it is competent to give interest on the value of the property lost from the date of the institution of the suit.[66] So a carrier which sells property because of the refusal of the consignee to receive it, is chargeable with interest on the proceeds in excess of the freight during the time they are withheld from the shipper.[67] But it has been stated in an action against a carrier for damages on account of injury to or destruction of property in transit, that interest is not recoverable.[68] In a California case it was held that

66. Dunn v. Hannibal & St. J. R. Co., 68 Mo. 268; Gray v. Mo. R. Packet Co., 64 Mo. 47; Lachner Bros. v. Adams Express Co., 72 Mo. App. 13, 21; Goodman v. Missouri, K. & T. R. Co., 71 Mo. App. 460, 464; Smith v. Whitman, 13 Mo. 352; Humphreys v. St. Louis & H. Ry. Co., (Missouri 1915), 178 S. W. 233, 236.

67. Stevens-Scott Grain Co. v. Atchison, T. & S. F. Co., (Kan. 1915), 149 Pac. 144.

A shipper recovering for damages to stock is entitled to recover interest from the date of damage as part of his compensatory damages. Texas & P. Ry. Co. v. Erwin (Tex. 1915), 180 S. W. 662. Also see San Antonio & A. Ry. v. Sutherland (Tex. 1917), 199 S. W. 521; Haglen Stahr Co. v. Montpelier & W. R. R. (Vt. 1918), 102 Atl. 940.

68. Stevens-Scott Grain Co. v. Atchison, T. & S. F. Ry. Co. (Kan. 1915), 149 Pac. 744; Reading v. C. B. & Q. R. Co., (Mo. 1915), 173 S. W. 451.

Where a claim is for unliquidated damages the amount of which is not susceptible of ascertainment by computation or by reference to market values, the claimant is not entitled to

where the carrier's liability was limited by the bill of lading to the value of goods at time and place of shipment, the shipper in case of partial loss could recover interest on the claim under the state law; the claim being capable of being made certain.[68a]

16. **Baggage.** Do the terms of the first Cummins Amendment apply to the transportation of baggage? This must apparently be answered in the affirmative. Transportation of baggage is a part of the contract for transportation of the passenger. The carriers have always limited their liability for loss of or damage to baggage. The baggage check is the carrier's receipt for the baggage. No other is required by the terms of the Carmack Amendment.[69] The conditions attached to the carrier's liability

interest prior to judgment. Barrett v. Northern Pac. Ry. Co. (Idaho 1916), 157 Pac. 1016.

In an action for damages to a shipment of live stock in the sum of $974, with a prayer for general relief, but without any special demand for interest as a part of the damages, interest might be allowed as a part of the damages, but to recover such interest the damages claimed in the pleadings must be laid in a sum sufficient to cover the loss at the time of the accrual of the cause of action, with interest thereon, from that date to the trial, and, where damages are not laid to such amount, the recovery is limited to the amount claimed. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

Where damages are laid at a certain sum, with interest theron at six per cent, the interest is then accumulated as a part of the damages, and is to be included in the amount of recovery as affecting jurisdiction. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

It is error to award a successful suitor in an action for injury to a shipment of corn interest upon the amount of his recovery where the issue of interest was not submitted to or determined by the jury. Houston & T. C. Ry. Co. v. Lewis (Tex. 1916), 185 S. W. 593.

Where a contract of shipment arose in the Indian Territory before statehood, interest may be recovered upon the damages accruing to the shipper by reason of delay in the delivery thereof. Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co. (Okla. 1917), 165 Pac. 1133.

Assuming that before a shipper can recover the penalty for failure to maintain a freight depot at which his goods could be delivered, under Vernon's Sayles' Ann. Civ. St. 1914, art. 6671, he must show pecuniary damage, such damage is shown in the interest upon the value of goods shipped and withheld. I. A. & P. Ry. Co. v. Warren (Tex. 1917), 198 S. W. 814.

68a. Olcovich v. Grand Trunk Ry. Co. of Canada (Cal. 1918), 176 Pac. 459.

69. B. M. R. R. v. Hooker, 233 U. S. 97; 58 L. Ed. 868; 34 Sup. Ct. 526.

are stated in the fare schedules and on passage tickets of contract form. In National Baggage Committee v. A. T. & S. F. Ry. Co., 32 I. C. C. 152, the Commission considered the carriers' rules relative to charges and liabilities in the transportation of baggage and prescribed certain reasonable regualtions, including reasonable insurance charges upon baggage declared to be of greater value than the maximum limit provided in the schedules and contract for carriage. All ordinary personal or sample baggage is hidden from view by boxing, wrapping, or other means, and the amended law seems clearly to recognize the carrier's right to fix conditions and terms applicable to the transportation of baggage dependent upon the value as declared by the person offering the baggage for transportation. The rule covering the measure of damages for the loss of baggage is somewhat different than that in the case of other property. The baggage itself is often the smallest part of the loss. So it has been held that the measure of damages for a carrier's delay in forwarding the sample trunks of a traveling salesman is the value of the use of the property during the delay, together with the loss of time occasioned thereby; the carrier's agent receiving the trunks for transportation with knowledge of their contents and intended use.[70] This is so because loss of time and

70. Kansas City M. & O. Ry. Co. v. Fugatt (Okla. 1915), 150 Pac. 669, 670.

As a general rule a carrier is not liable for loss of samples carried by a commercial traveler.

The general rule is stated in Moore on Carriers, 2nd ed., page 1297:

"The samples carried in his trunk by a commercial traveler and belonging to his employer, although necessary to the object of the passenger's journey, are held not to be personal baggage, but properly mere merchandise, but a salesman's catalogue or price book is his personal baggage. Where a carrier undertakes, without extra compensation, to transport a traveilng case with notice that it contains merchandise or samples, and not baggage, it will be liable for the loss thereof. And where a carrier, with a full knowledge of the character of the contents of a trunk, or that the articles therein are not properly baggage, receives the same for transportation as baggage, it will be liable therefor. But the fact that commercial travelers or others are accustomed to carry merchandise on passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carrier, will not render it liable for such merchandise. The mere payment of an extra charge, on account of the overweight of alleged baggage, does not convert it into freight and render the carrier liable for it as such; and where merchandise to be

inability to make sales because of delay in receiving trunks containing samples will be regarded as within the contemplation of the carrier when it receives and checks a salesman's sample trunks as baggage, so as to entitle him to recover damages therefor in case of such delay.[71] However, it may be stated that upon arrival of a trunk at the passenger's destination, it was the duty of the carrier to put off the trunk, and it was the duty of the passenger then to take the trunk, but, in the nature of the case, not immediately. The passenger has a reasonable time to lay hands on, and the carrier has a like time to take hands off; and until that time transpires the trunk has not arrived, and a new relationship thereabout has not set in.[72] When that time has transpired it may be the law will regard the situation as amounting to a constructive delivery.[73] What is a reasonable time for delivery must, in some cases be determined by a jury.

used in trade is packed in a trunk, and shipped as personal baggage, the carrier having no notice or knowledge of its character, no liability as a common carrier attaches. But if the trunks and this compensation are received with notice that the trunks contained property other than the baggage of the passenger, then there is evidence of an agreement, aside from the contract to transport the passenger, for a new, separate, and independent consideration, to transport such property as freight, which will render the carrier liable therefor."

To the same effect see:

Talcott v. Wabash R. Co., 66 Hun (N. Y.), 456; 21 N. Y. S. 318.

Gurney v. Grand Trunk R. Co., 59 Hun (N. Y.), 625; 37 N. Y. S. Rep. 155; 14 N. Y. S. 321.

Scoville v. Griffith, 12 N. Y. 509.

Hawkins v. Hoffman, 6 Hill (N. Y.), 586.

Michigan Cent. R. Co. v. Carrow 73, Ill. 348.

Weber Co. v. Chicago, etc., R. Co., 92 Iowa, 364; 60 N. W. 637.

McElroy v. Iowa Cent. Ry. Co. (Iowa), 110 N. W. 915.

Southern Kansas R. Co. v. Clark, 52 Kan. 398.

Jacobs v. Tutt, 33 Fed. 412.

Alling v. Boston, etc., R. Co., 126 Mass. 121; 30 Am. Rep. 667.

Stimson v. Connecticut River R. Co., 98 Mass. 83; 93 Am. Dec. 140.

Rossier v. Wabash R. Co., 115 Mo. App. 515; 91 S. W. 1018.

Pennsylvania R. Co. v. Miller, 35 Ohio St. 541; 35 Am. Rep. 620.

Texas, etc., R. Co. v. Capps, 2 Tex. App. Cas., sec. 33.

71. Kansas City, M. & O. Ry. Co. v. Fugatt (Okla. 1915), 150 Pac. 669, 670.

72. Spears v. Railroad, 11 S. C. 158, 188.

73. Heyman v. Railroad, 203 U. S. 270, 276, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130.

e there is a dispute, about what took place between the
ıger and the carrier at the time the trunk left the cars, and
ore whether or not a new relationship was instituted be-
. them, the issue of a reasonable time to deliver ought to go
ury.[74] Generally speaking, limitations of liability for the
of baggage were binding prior to the passage of the Cum-
Amendment, and are still preserved by that law.[75] A
ng car company is under a duty to exercise the same
e of reasonable care and watchfulness over the personal
s of a passenger and is equally liable for the loss thereof
he is asleep during the daytime as when he is asleep at
[76] Where a theatrical manager placed a trunk containing
ıal property in a baggage car specially contracted for,
ng the effects of the company, and part of the contents of
unk was lost, he could not recover from the railroad at least
under stipulation on the back of his ticket that baggage
tion was limited to $100 for an adult, etc.; the stipulation
ferring to goods in the nature of baggage shipped as freight
ıerwise than as baggage, the manager having undertaken

Harris v. Southern Ry. Co., 1915), 85 S. E. 158, 160.

ı action for damages for delay delivery of a trunk, evidence he cost of clothing purchased : in the meantime, without evi- ıs to the value of such cloth- the time of the delivery of the is not a sufficient basis for a , since the measure of dam- ; the difference between the such clothing and its value at ıe the trunk was delivered. man v. Barrett 157 N. Y. S.).

ı action for damages for de- the delivery of a trunk, the is on the plaintiff to show the ıf the clothing at the time of /, not on the defendant to uch fact by way of mitigation ıages. Lichterman v. Barrett, Y. S. 882, 883.

75. In an action by an actor to recover for a trunk and its contents, which was lost on an interstate journey, where the actor's management received a reduced rate, which limited carrier's liability for baggage, held that the actor could not recover a sum in excess of that stipulated. Lackaye v. Penn. R. Co., 159 N. Y. S. 191.

A receipt for a trunk which states that the carrier's liability is limited to $50.00 is valid. Lichterman v. Barrett, 159 N. Y. S. 929, 932.

It has been held in the case of a state shipment of baggage, that the passenger was not held to a limitation of liability in the ticket, as such limitation did not apply to a case of conversion. Goldstein v. R. P. Ry. (N. D. 1917), 164 N. W. 143.

76. Robbins v. Pullman Co. 164 N. Y. S. 111.

to have his trunk carried under a distinct contract of shipment.[77] Acceptance and use by an interstate passenger of a railway ticket which purported to limit baggage liability to a specified sum unless a greater value should be declared and excess charges paid suffice to establish an agreement prima facie valid, limiting the carrier's liability in this respect, and the mere failure of the passenger to read the ticket could not overcome the presumption of assent.[78]

17. **Punitive Damages.** In certain cases the courts have allowed so-called punitive damages to be recovered against carriers. These are damages allowed as a punishment in addition to the ordinary damages recoverable. They are only permitted in extreme cases. So where an express company, shipping a piano, delayed it in such a manner that a person of ordinary reason and prudence would have said it was a reckless disregard of the shipper's rights, the company was liable for punitive damages.[79]

77. McKeon v. N. Y., N. H. & H. R. R. Co., 164 N. Y. S. 312.

78. New York, C. & H. R. R. Co. v. Beaham, 37 Sup Ct. 43.

In New York C. & H. R. R. Co. v. Beaham, 37 Sup. Ct. 43, the court said, p. 44:

"The transactions in question related to interstate commerce; consequent rights and liabilities depend upon acts of Congress, agreement between the parties, and common-law principles accepted and enforced in Federal courts. And the carrier is entitled to the presumption that its business is being conducted lawfully. Southern Exp. Co. v. Byers, 240 U. S. 612, 614, 60 L. ed. 825, 827, L. R. A. 1917A, 197, 36 Sup. Ct. Rep. 410; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 326, 60 L. ed. 1022, 1025, L. R. A. 1917A, 265, 36 Sup. Ct. Rep. 555. In the circumstances disclosed, acceptance and use of the ticket sufficed to establish an agreement prima facie valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her could not overcome the presumption of assent. New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Fonseca v. Cunard S. S. Co. 153 Mass. 553, 12 L. R. A. 340, 25 Am. St. Rep. 660, 27 N. F. 665."

79. Piero v. Southern Express Co. (S. C. 1916), 88 S. E. 269. Also see So. Express Co. v. Malone (Ala. 1918), 78 So. 408; Dixon v. S. P. Co. (Nev. 1918), 172 Pac. 368.

A son shipped his mother's corpse by railroad, and when the box and casket containing it were being unloaded at its destination the baggageman pushed one end upon a truck about 18 inches below the door of the car, threw the other end out, and threw a heavy trunk on top of it. The shipper protested, telling him the box contained his mother's body, and

Under the Carmack Amendment, as to a carrier's liability for "loss, damage or injury" to goods delivered to it for shipment, punitive damages were not recoverable against a carrier for willfulness or wantonness of its servants in delaying transportation of goods shipped, where it did not appear the carrier authorized or ratified such acts, notwithstanding the later enactment of the Cummins Amendment, providing for liability of the carrier for the full "actual loss" to goods shipped.[80] Under the Carmack Amendment, as to carrier's liability for "loss, damage, or injury," to goods, etc., delivered to it for shipment, punitive damages are not recoverable against a carrier for the mere wrongful acts.[81] The general rule is that punitive damages cannot be awarded unless actual damages are first proved.[82] Where a carrier by mistake placed cattle in a "quarantined" pen where they were held longer than they would have been if placed in a "native" pen in which they belonged so that the owner suffered a decline in the market, the circumstances are not such as to warrant the imposition of punitive damages.[83]

18. Duty of Claimant to Reduce Loss. Ordinarily it is the duty of the injured party to use ordinary and reasonable care to

the baggageman replied with profane and vulgar language, and continued to throw other trunks on the box until the thumb-screws were bent down and the sides of the box broken open, making it necessary to repair the box before the funeral. The jury returned a verdict of $5 actual damage and $500 punitive damages. It was held that the punitive damages were not excessive, or so out of proportion to the actual damages as to indicate passion and prejudice and should be sustained. Wall v. St. Louis & S. F. R. Co. (Mo. 1916) 182 S. W. 1057, 1058.

80. De Loach v. So. Ry. Co. (S. C. 1916), 90 S. E. 701.

81. Harman v. So. Ry. (S. C. 1916), 90 S. E. 1023. Also see De Loach v. So. Ry. 90 S. E. 701.

82. Q. A. & P. Ry. Co. v. Warren (Tex. 1917), 198 S. W. 814.

83. Illinois Cent. R. Co. v. Smith (Miss. 1917), 75 So. 120.

Vernon's Sayles' Ann. Civ. St. 1914, art. 6671, providing a penalty for failure to maintain proper freight depots, is independent of the common-law right of action for refusing to deliver goods, and the remedy may be pursued without reference to actual damages, and the common-law rule that where no actual damage results, exemplary damages cannot be recovered does not apply. A. & P. Ry. Co. v. Warren (Tex. 1917), 198 S. W. 814. See Painesville Nat'l Bank v. Hannan (Colo. 1918), 171 Pac. 364.

lessen the damages and preserve the property, the burden to show that he has not done so being upon the adverse party.[84] This does not mean, however, that he must go to any extraordinary effort in order to save the carrier from the natural results of its negligence. For instance, furniture is damaged in transit. Now no duty rests upon the shipper of the damaged furniture to have the carrier return the furniture to him, repair it, and then resell it for what he can get and charge the carrier with the difference. In a case of this kind, the carrer is liable to the shipper for the difference between the value of the furniture at destination had it arrived in good condition and its value when it arrived in a damaged condition. If the carrier desires, it can, with the consent of the shipper, authorize some one to repair the furniture if in that case it believes it can reduce damages. But the shipper need not consent to this procedure unless he wishes to. It is a very common error for shippers to believe that they must place their plants at the disposal of the carrier in order to reduce damages. Where a shipment arrives at destination in a damaged condition it is a frequent occurrence for the railroad to refuse to pay any claim unless the shipper will pay return charges on the shipment, repair it and resell it. No such duty as this at all rests upon the shipper. The duty of the carrier is to pay the difference between the value of the shipment in the damaged condition at the time it arrived, and its value had it arrived on time in good condition, which generally would have been the invoice price to the consignee. Of course, the shipper can, as a matter of courtesy and fair dealing, if it so desires, have the shipment returned to it and repair it for the account of the carrier, but there is no legal obligation resting upon it to do this. It is suggested it might not be amiss for the carriers to provide that goods which are repaired for their account by shippers may be returned free of charge to the shipper for such repairs, instead of compelling the shipper to pay an additional freight rate on the damaged shipment. Where damaged shipments or part of the shipment are sold at destination, however, the shipper must on his side be fair and use an effort to get the market value for the shipment. It is not the

84. P. S. F. Ry. Co. v. Norton (Tex. 1916), 188 S. W. 1011.

price at which he sells the shipment that determines the difference which he can recover from the carrier, but it is the market value of the shipment whatever that may be.[85]

19. **Export and Import Shipments.** The question was asked: Does the amendment to the act apply to export and import shipments to and from foreign countries not adjacent to the United States? The Commission said this must be answered in the negative, in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States.[86] Under Rev. St. § 2852 (U. S. Comp. St. § 5540), in an action by a consignee against the initial carrier by rail, the value of goods shipped from Germany to this country held established at least prima facie by a consular invoice issued by the American Consul General in Germany.

85. Where live stock were negligently killed in transit and the shipper removed their hides and sold them, the carrier should be allowed, not the actual price, but the market value at the time and place where the hides were removed. Panhandle & S. F. Ry. Co. v. Norton (Tex. 1916), 188 S. W. 1011.

86. The Cummins Amendment, 33 I. C. C. 682.

In its report in the bill of lading case, 52 I. C. C. 671, the Interstate Commerce Commission discussed the situation with respect to the export bill of lading and said, p. 726:

"PART 2.—THE EXPORT BILL OF LADING.

JURISDICTION OF THE COMMISSION.

"This proceeding, so far as it involves an inquiry relative to export bills of lading and questions appertaining thereto, presents, in some respects, an original field of investigation by the Commission, since no investigation directed specifically to that subject has been conducted heretofore by it. Questions relating to such bills have come incidentally before the Commission in other cases, but usually upon questions involving issues of undue preference or prejudice in the practices of the carriers.

"By reason of its peculiarities of form and substance the export bill stands somewhat apart from the domestic and live stock bills. The Commission has no authority to require of carriers the issuance, as such, of joint through export bills on traffic destined to nonadjacent foreign countries, because it has no authority or jurisdiction over the carriers from the port of export and could not prescribe the conditions to be written into a bill of lading covering the transportation by such carriers, which

conditions, of course, constitute an essential part of the contract for through transportation; but, as was said in Galveston Commercial Asso. v. A., T. & S. F. Ry. Co., 25 I. C. C., 216, this does not mean that the Commission may not, in a proper case, exercise its authority over the inland carrier to the port. While its authority over bills to nonadjacent countries is, as already indicated, more limited and attaches more indirectly than in the case of bills covering domestic interstate traffic, or traffic to an adjacent foreign country, it nevertheless does have authority over the rules, regulations, and practices, of inland carriers subject to the act, when, and if, they join in through bills of lading to nonadjacent foreign countries, and it requires such rules and regulations to be published and filed. (Conference Ruling No. 378.)

"The transportation of traffic from an inland port to a port of export, for export, is subject to all the provisions of section 1 of the act. This is true even when the transportation to the port is performed wholly within the confines of the state in which it originates and whether the traffic be carried on local or on through bills of lading. Red River Oil Co. v. T. & P. Ry. Co., 23 I. C. C., 438; Texas & Pac. Ry. Co. v. Railroad Com'n of Louisiana, 183 Fed., 1005; So. Pac. Terminal Co. v. Int. Comm. Comm., 219 U. S., 498. Not all the provisions of the act, however, are applicable to export traffic. The Carmack Amendment, as we have seen, applied only to transportation 'from a point in one state to a point in another state,' but the provisions of the Cummins amendments include 'transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor.'

"The principal differences between the carriers and the shippers with respect to the terms and conditions which should, or should not, be incorporated in the export bill seem to arise (1) from the question whether or not the Carmack and Cummins amendments apply to traffic to a nonadjacent foreign country, (2) whether the rail carrier in delivering at its terminus, or at the end of its haul, may be treated as delivering to a consignee or his agent, or must be treated as delivering to a connecting carrier.

"The Cummins amendment is of comparatively recent enactment, and our attention has not been directed to any judicial decisions in respect of its provisions that point the way to a determination of the question whether or not it applies to foreign commerce to a nonadjacent foreign country. On the other hand, the application of the Carmack amendment has been considered in a number of cases and it is in the light of these decisions that we must consider the similar questions relative to the effect and application of the Cummins amendment. In Houston East & West Texas Ry. Co. v. Inman, Akers & Inman, 63 Tex. Civ. App., 556, involving the question of the application of the Carmack amendment to a shipment of cotton from a point in Texas to a port in Germany, the court having occasion to consider the language of the amendment and to construe the meaning of the word 'state' held:

"'This language is clear and un-

ambiguous, and the prohibition against the right of a connecting carrier to limit its liability to loss or damage occurring on its own line is only applicable when the shipment is from "a point in one state to a point in another state." The use of this language excludes the idea that Congress intended to prohibit such contracts when the shipment was to a foreign country.

" 'The word "state," as used in the constitution of the United States, has been uniformly construed to mean a constituent member or part of the federal Union having an independent local governmental organization, but as used in the statutes and treaties of the United States it has been construed to include territories of the United States, and also foreign countries or states when such construction is required by the context of the act or instrument, and is necessary to effectuate its purpose. * * *

" 'We think it clear from an examnation of the entire act that the word "state," as used in the amendment in question, was used in its limited constitutional sense, and was intended to mean a state of the federal Union. Other portions of the act are expressly made applicable to shipments from "any state or territory or the District of Columbia to any other state, territory or District of Columbia, or to any foreign country," showing that Congress did not understand or intend that the word "state" as used in the amendment should include a foreign state or country, as well as a state of the Union.'

"In J. H. Hamlen & Sons Co. v. Illinois Cent. R. Co., 212 Fed., 324, which was an action growing out of a transaction in which export bills of lading had been issued to cover shipments from a point in the United States to Buenos Aires, Argentine Republic, through the port of New Orleans, the court said at page 326:

" 'The bills of lading expressly provide that the carrier issuing the same only issued them on its own behalf over its own lines, and as agent for the connecting lines, without a joint, but several, liability, and as the Carmack amendment applies only to transportation between the states, and not to foreign countries, the defendant is clearly not liable under the bill of lading, even if it had been the initial carrier which had issued the bill of lading, which it was not, * * * '

"In its report in *The Cummins Amendment, supra,* page 693, the Commission held that the Cummins amendment did not apply to export and import shipments to and from foreign countries not adjacent to the United States for the reason that 'while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States.'

"In Brunswick-Balke-Collender Co. v. T., S. & M. Ry. Co., 44 I. C. C., 598, 600, property, which was delivered to the initial carrier for transportation from Muskegon, Mich., to Mexico City, Mexico, via inland carriers to New Orleans, thence via steamer to Vera Cruz, Mexico, was damaged by fire after loading on the steamer at New Orleans and before it left the dock. The Commission, having occasion to consider whether or not the Cummins amendment was ap-

plicable to the shipment, referred to the fact that the Carmack amendment mentioned only transportation 'from a point in one state to a point in another state,' and said:

"'This provision was extended by the Cummins amendment, effective June 2, 1915, so as to include and apply to property received for transportation *"from any point in the United States to a point in an adjacent foreign country."*

"' * * * While it is true that this shipment moved from a point in one state to a point in another state of the United States in reaching the port of export, its essential character was that of "foreign commerce," or *property received for transportation to an adjacent foreign country;* and that Congress did not regard the Carmack amendment as applicable to such shipments may be inferred from the fact above indicated that the provisions of that amendment were extended by the Cummins amendment to specifically apply to commerce to an adjacent foreign country.'

"Applying the rationale of these cases to the question before us, it seems evident that it was not the intention of Congress to make the Cummins amendment applicable to traffic to a nonadjacent foreign country. There is a clear distinction between 'interstate' and 'foreign' commerce in the wording of the act throughout, and in the definitions of the courts in construing these terms, whether or not the cases arise under the act to regulate commerce. Transportation in interstate commerce, as used in the act, means the transportation of commodities between, or among, the states, territories, etc. Transportation in foreign commerce, as used in the act, means the transportation of commodities between a point in the United States and a point in a foreign country.

"The deduction seems clear and inevitable that transportation from a point in the United States to a point in a nonadjacent foreign country can not be brought within the specification of the Cummins amendment of commerce 'from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country.' For obvious reasons, not necessary to enlarge upon, it seems equally clear that commerce from a point in the United States to a point in a nonadjacent foreign country moving wholly intrastate from the point of shipment to a port of export is not within the purview of the amendment. This interpretation is supported by the holdings of the courts in St. Louis, I. Mt. & So. Ry. Co. v. Starbird, 243 U. S., 592, and Aldrich v. Atlantic Coast Line R. Co., 104 S. C., 364.

NATURE AND FUNCTIONS OF THE EXPORT BILL OF LADING.

"Considered as a receipt for the goods the export bill is substantially similar to the domestic bill. As a contract to transport, however, it has many points of difference. The undertaking with respect to transporting the property is that it is 'to be carried to the port (A) of * * *, and thence by to the foreign port (B) * * * *, and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination, if consigned beyond said port (B) * *.

"'In consideration of the rate of

freight herein named, it is hereby mutually agreed by each carrier, severally but not jointly, that the service to be performed by it hereunder shall be subject to the conditions not prohibited by law, whether printed or written, herein contained, which are hereby agreed to by the shipper and by him accepted for himself and his assigns.'

"The form of signature on the proposed bill specifies that the agent for the carriers signs on behalf of them severally, but not jointly. The form also provides for signature by the shipper, or his agent; the declaration on behalf of the shipper being that 'I (we) accept all the conditions of this bill of lading.'

"The shippers object not only to the proposal that the carriers shall be bound only severally, and not jointly, but also to the unconditional acceptance of all the conditions to which they are asked to subscribe. The through export bill of lading is not regarded by the Commission as a joint contract or undertaking for the through carriage of property from an interior point in this country to a foreign port, but merely as an instrument combining, for the convenience of the shipper, the separate and several contracts of the rail carriers to the American port and the ocean carrier beyond. New York Produce Exchange v. B. & O. R. R. Co., 46 I. C. C., 666, 670. It must clearly separate the liability of the rail and ocean carriers and show the published rate of the inalnd carrier. The publication of such rate does not in any manner limit the very valuable privilege of through billing. Cosmopolitan Shipping Co. v. Hamburg-Amer. Packet Co., 13 I. C. C., 266, 281.

"The advantages of the through export bill to the shipper are important. Being a bill for through transportation, more favorable demurrage rules apply at the port than apply on domestic traffic. Moreover, if export traffic were moved to the port under a domestic bill of lading, the shipper would be obliged to take out a ship's bill of lading. This would often be a great disadvantage in financing his operations, for he could not draw a draft against his foreign customer until he had gotten his ship's bill of lading, whereas the through export bill may be negotiated immediately, as is the common custom.

"In discussing the proposed export bill it is necessary, therefore, to keep in mind the limitations referred to, and also the advantages to the shipper and the commerce of the country in having a negotiable form of export bill.

CONDITIONS OF THE EXPORT BILL OF LADING.

"The proposed bill contains the general condition that 'any alteration, addition or erasure herein which shall be made without an indorsement hereon signed by the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.' This provision, concerning which there is no controversy, is in accordance with the provisions of section 13 of the bills of lading act.

"*Section* 1, *Clause* 2, *Differences in Elevator Weights.*—By this section it is provided that the carrier shall not be liable for 'differences in the weights of grain, seed, or other commodities caused by * * * or discrepancies in elevator weights.' This provision is identical with that pro-

posed in the domestic bill and considered *ante*. The reasons which, in our judgment, required the condemnation of the rule there apply here, and it will be eliminated from the form to be approved by us.

"*Section* 1, *Clause* 3, *Liability of Carrier as Insurer and Warehouseman for Loss, Damage, or Delay Caused by Fire.*—This provision, likewise identical with that in the domestic bill, reads:

" 'For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of Sundays and legal holidays) after notice of the arrival of the property at the port of export has been duly sent or given, the carrier's liability shall be that of warehouseman only.'

"For reasons there stated the phraseology prescribed in the domestic bill, with such modification as is appropriate to export traffic, should be employed in the export bill.

"*Section* 1, *Clause* 5, *Transportation in Open Cars.*—This provision is identical with that proposed to be inserted in the domestic bill and which we there condemned. Although, for some reason, the provision in the export bill is not attacked as it was in the domestic bill, we conceive of no reason why it is any more defensive or justifiable here than in the domestic bill.

"In part for the reasons stated in discussing its proposed insertion in the domestic bill, and further because we find that it would be unjust and unreasonable, it will be eliminated from the export bill.

"*Section* 2, *Clauses* 1 *and* 2, *Agency of Issing Carrier—Proposed Exemption of Participating Carrier for Liability for Loss, Damage, or Injury to Property Not Occurring on Its Own Line.*—These two clauses, which must be considered together, provide:

" 'In issuing this bill of lading this company agrees to transport only over its own line and acts only as agent with respect to the portion of the route beyond its own line.

" 'No carrier shall be liable for loss, damage, or injury not occurring on its own road or its own water line or its portion of the through route, nor after said property has been delivered to the next carrier.'

"The declared purpose of this section is to limit the contract of the issuing carrier to its own line, and to provide that no participating carrier in the through route shall be liable for loss, damage, or injury not occurring on its own portion of the route, or after the property shall have been delivered to the next connecting carrier. The carriers' contention, as stated on brief, is that the provisions of the Cummins amendment have no application to shipments carried under *this form* of bill of lading, as it is not used on shipments to adjacent foreign countries.

"Such a limitation, if included in a bill of lading issued to cover a shipment to a point in an adjacent foreign country, would be unlawful and void under the terms of the Cummins amendment.

"The shippers object to the retention of this clause in the bill and propose that the entire section shall be eliminated. The proposal of the shippers goes beyond the necessities of the situation, however, for while the carrier may not make such a limitation in respect of interstate traffic within this country, nor in respect of traffic to an adjacent foreign country, it may, in respect of expert traf-

fic to nonadjacent foreign countries, still enjoy its common law right to contract for such a limitation of its liability. Congress has not sought to take this right from it. While the carrier is bound to issue to the shipper a bill of lading on a shipment destined 'from a point in the United States to a point in an adjacent foreign country,' the law does not say that, in form, such a bill of lading shall be an 'export' bill. We think, however, that the matter should be removed from the field of controversy by inserting, as a general condition of the bill of lading, supplementary to the one already referred to, the following:

" 'This bill of lading is not to be used on traffic from a point in the United States destined to a point in an adjacent foreign country.'

"*Section 3, Clause 1, Transportation to Be Only With Reasonable Dispatch Unless by Specific Agreement Indorsed on the Bill.*—Section 3, clause 1, reads as follows:

" 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch unless by specific agreement indorsed hereon.'

"While no objection is raised to the provisions of this clause, we think that the reservation by the carriers of the right to grant expedited service by special agreement indorsed on the bill of lading, as contained in the words, 'unless by specific agreement indorsed hereon' is objectionable. Thus it would be possible for certain favored shippers through special indorsements on their bills of lading to secure special and expeditious handling of their shipments, possibly to the undue prejudice and disadvantage of their less favored competitors.

"For this reason we are of the opinion these words should be eliminated.

"*Section 3, Clause 3, Measure of Carrier's Liability for Loss or Damage.*—The carriers propose the following:

" 'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.'

"The shippers propose as a substitute for this provision the following:

" 'The amount of any shortage (loss of property in whole or in part) for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid; unless a lower value has been agreed upon or is determined by the classification or tariff schedule upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. And for any damage or delay to property transported hereunder, the amount shall be the loss sustained by the owner of the property by reason of said damage or delay.'

"It will be noted that the shippers'

proposal differs from that of the carriers in only one material respect, namely, that in the event of damage or delay to property the amount of liability 'shall be the loss sustained by the owner,' which at common law is computed on the basis of the value at point of destination. However, as we have noted, the provisions of the Cummins amendment apply only to such export shipments as are destined to 'a point in an adjacent foreign country.' To shipments destined to a nonadjacent foreign country the provisions of this amendment do not apply, and our jurisdiction over the issuance, form, and substance of bills of lading covering such shipments is limited to the provisions which govern the inland or coastwise transportation to the port. It has been the practice of the carriers for many years to provide for the restriction of the amount of their liability to the value at point of origin in both their export and domestic bills of lading. They assert that the value at point of origin can be in most instances definitely and accurately determined, while the value at point of destination is often conjectural and inflated by anticipatory profits, involving frequent litigation in determining the measures of damages. We are of the opinion that the carriers' proposal in question is not shown to be unreasonable. However, we believe that the words 'including loss or damage arising from delay' should be inserted after the word 'damage' in the first line thereof, so that the same would read as follows: 'The amount of any loss, damage, including loss or damage arising from delay, for which any carrier is liable, etc.'

"*Section* 5, *Clause* 1, *Carrier's Liability as Warehouseman. After* 48 *Hours.*—The purpose of this provision is to effect, or secure, to the carrier the same exemption or limited liability at port (A) that is sought to be obtained by the proposal in a corresponding section of the domestic bill heretofore discussed. The only difference in phraseology is that which makes the proposed provision appropriate to transportation to a port of export instead of other destination. The shippers propose with respect to this provision, as they did with respect to the one in the domestic bill, that it be eliminated without substitution of any kind.

"The theory upon which the shippers' objection to the condition here proposed are primarily founded is that the export bill is a joint and not several, contract on the part of the participating carriers for through transportation and that so regarded there can be no suspension or interruption of the transportation, and therefore no period of time at the port when neither the inland nor ocean carrier assumes the liability of a carrier for the protection of the property; that is, that there can be no period of time during which both the inland and the ocean carrier may claim to be divested of liability other than that of warehouseman. But with this view we can not agree. The export bill is not a joint contract for through transportation from the inland point in this country to the foreign destination and the act to regulate commerce does not impose upon the carriers subject thereto any obligation to issue such a bill. The particular objections urged to the proposed condition are (1) that it tends to impair or destroy the negotiability of the bill; and, (2) (this is really involved in and constitutes in part

the basis for objection (1) just stated,) that in the event of delay or inability to deliver the shipment to the ocean carrier within the free time allowed by the inland carriers' tariffs the shipment may become subject to storage and other port charges which can not be definitely known to the shipper at the time he makes his sale or shipment, and which the foreign customer refuses to assume or pay if his contract of purchase is made c. i. f. It is also urged that the proposed section would adversely affect the insurance policies of the shipper, or would force the shipper to take special insurance. Witnesses testified in support of these objections.

"We have considered the subjects of free time allowances, storage, and other port charges in other cases. In *Export Freight Free Time,* 47 I. C. C., 162, decided November 12, 1917, we found that the carriers' proposal to reduce the free time allowed on export traffic from 15 days to 5 days at the north Atlantic ports and from 10 days to 5 days at the Gulf ports was not justified but that under the circumstances then existing the free time at the north Atlantic ports might reasonably be reduced to 10 days and at the Gulf ports to 7 days. In New York Produce Exchange v. B. & O. R. R. Co., supra, decided October 1, 1917, we said with respect to the assessment of storage charges at the port of New York in cases where the time which elapsed between the arrival of an export shipment by rail and its delivery to the ocean carrier exceeded the free time allowance of 15 days that as a matter of law neither the rail nor the ocean carrier is liable for the storage charges at the port. And further, page 671:

" 'The question whether such charges should be assessed is squarely presented and has been fully and thoroughly briefed and argued in No. 4844, In the Matter of Bills of Lading. Without prejudice to any conclusion that may be announced in that case, we hold upon this record that the assessment of such charges has been justified.'

"Neither upon the facts shown of record in this case, nor upon the arguments made thereon, can we find that the assessment of storage charges, as such, under reasonable regulations, is unjust or unlawful.

"The proposed condition is, however, subject to this objection, that it undertakes to limit the carrier's liability to that of warehouseman only after 48 hours after its arrival at the port, and reserves the right, among other things, to remove it and store it in a public warehouse 'at the owner's risk.' For the reasons heretofore stated in connection with the domestic bill we must disapprove the proposed condition in these aspects.

"The record does not show that the operation of the condition objected to seriously impairs, much less destroys, the negotiability of the export bill of lading. As the law now stands, carriers can not be required to issue a through export bill of lading to the foreign destination binding jointly upon them and subjecting them to the same limitations that the law imposes upon them in respect of the issuance of domestic bills of lading applicable on interstate traffic and on traffic destined to adjacent foreign countries.

"We disapprove the condition as proposed, but we approve a condition reading as follows:

" 'Property not removed by the exporting carrier, or the party entitled

to receive it, within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property for delivery at port (A), or tender of the property for delivery upon order of the party entitled to receive it has been made, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to the carrier's responsibility as warehouseman, only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at port (A), or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.'

"*Section 5, clause 2, receipt or delivery of property at private or other sidings, wharves, or landings, etc.*—This clause, which is identical with a corresponding clause of the domestic bill, heretofore discussed, reads as follows:

"'Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent, shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and, except in case of carrier's negligence, when received from or delivered on private or other sidings, or on such wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.*'

"The shippers object to the portion of the condition printed in italics and propose that it be eliminated without substitution. There is nothing of record to indicate that the objectionable part of the condition stated above is any more reasonable or defensible when applied to export traffic than when applied to domestic traffic. It seems to require no further consideration and for reasons already stated in discussing its proposed inclusion in the domestic bill we find here, as there, that the proposal expressed in italics is and would be unreasonable and should be omitted from the bill. It is therefore disapproved.

"*Section 9, clauses 1, 2, 3, 4, 5, and 6, limitations of liability of water carriers.*—Since, as we have already held herein, the Cummins amendment does not apply to transportation from a point in the United States to a point in a nonadjacent foreign country, the carriers are not precluded from incorporating in the export bill of lading reasonable provisions applicable exclusively to water carriers. The shippers object to the incorporation of the proposed clause in the export bill upon the same grounds that they opposed its inclusion in the domestic bill. We need not repeat those arguments.

"We have given consideration to the conditions and stipulations proposed by the carriers and to the objections and counter stipulations in respect of the water carriers' exemption from liability proposed in their behalf are unreasonable and indefensible, and, in many instances, in violation of the law. The objections of the shippers are in many cases ill considered and equally unreasonable. We think that reasonable conditions

awful limitations of liability with propriety annd advantage orporated in the export bill, pon consideration thereof we at the following would be just asonable:

c. 9. Except in case of di- n from rail to water route, as ed for in section 3 hereof, if any part of said property is l by water over any part of oute, such water carriage shall formed subject to the liabilities, ions, and exemption provided tute and to the conditions con- in this bill of lading not in- ent therewith or with this

o such carrier by water shall ble for any loss or damage re- from any fire happening to board the vessel, or from ex- n, bursting of boilers or break- shafts, unless caused by the or neglect of such carrier.

the owner shall have exer- due diligence in making the in all respects seaworthy and ly manned, equipped, and sup- no such carrier shall be liable ny loss or damage resulting the perils of the lakes, seas, or waters, or from latent defects l, machinery, or appurtenances, er existing prior to, at the time after sailing, or from collision, ing, or other accidents of navi- , or from prolongation of the e. And, when for any reason it essary, any vessel carrying any l of the property herein de- d shall have the liberty to call r port or ports, to tow and be , to transfer, transship, or r, to load and discharge goods r time, and assist vessels in dis- to deviate for the purpose of saving life or property, and for dock- ing and repairs. Except in case of negligence, such carrier shall not be responsible for any loss or dam- age to property if it be necessary or is usual to carry the same upon deck.

"'If the shipowner shall have com- plied with the provisions of section 3 of the Harter act, it is hereby agreed that the owners or consignees of the cargo shall contribute with the ship- owner in general average, and shall pay any salvage or special charges properly incurred, even though the necessity for the sacrifice or ex- penditure was brought about by fault in navigation or management of the ship.

"'If the property is being carried under a tariff which provides that any carrier of carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or car- riers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

"'The term "water carriage" in this section shall not be construed as in- cluding lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

"Section 10, *clause* 1, *exemptions from liability for delay, and reduction of liability to that of warehouseman, while the property is awaiting further conveyance.*—Section 10, clause 1, as proposed by the carriers, reads as fol- lows:

"'No carrier shall be liable for de- lay, nor in any respect other than as warehouseman, while the property awaits further conveyance, and in case the whole or any part of the property specified herein be prevent- ed by any cause from going from

the port of export in the first vessel of the ocean line for which intended leaving after arrival of such property at the said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding vessel of said line, or, if deemed necessary, by any other vessel.'

"The shippers object to the words italicized above and suggest their elimination without any substitution in the place thereof. Their objection is based upon the theory that as an export shipment is a through shipment from an inland point of origin to a foreign destination, necessarily requiring transportation over a part of the route by a foreign carrier, the contract of carriage is a joint and indivisible one, instead of a separate and distinct contract on the part of each carrier participating in the transportation. However, as already stated, we are of the opinion that the provisions of the Carmack and Cummins amendments are inapplicable to export shipments destined to points in nonadjacent foreign countries, and it is only by the provisions of these amendments that carriers are prohibited from restricting their liability for loss, damage, or injury not occurring on their respective separate lines. In the absence, therefore, of any statutory provision, a carrier is within its legal rights in contracting against liability for a delay not occurring on its own line not the result of its negligence, and, where proper tender of a shipment has been made to a connecting line, to reduce its liability thereafter to that of a warehouseman for the period such shipment is awaiting further transportation. We are of the opinion that the words in italics are not illegal, but they are unreasonable in that they are capable of an interpretation which would exempt all of the carriers from delay, however caused or wherever occurring. We find, therefore, that the following language should be adopted instead of that proposed by the carriers:

" 'No carrier shall be liable for delay not occurring on its own line, or the result of its negligence, nor in any respect other than as warehouseman, while the property awaits further conveyance after proper tender of delivery to the next connecting carrier has been made, and in case the whole or any part of the property specified herein be prevented by any cause from going from the port of export on the first vessel of the ocean line for which intended leaving after arrival of such property at the said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding vessel of said line, or, if deemed necessary, by any other vessel.'

"*Section* 10, *clause 2, termination of inland carrier's liability upon delivery made in accordance with existing arrangements at the port* (*A*).—This clause reads as follows:

" 'This contract is executed and accomplished, and all liability hereunder terminates upon the delivery of the said property to the exporting steamer, her master, agents, or servants, or to the exporting steamship company, *or subject to existing delivery arrangements, if any, on the pier usually used by the exporting steamer at the port of export, whether or not the same may be the property of or used as a warehouse by the inland carrier also,* and the inland freight and all other charges hereinbefore provided for shall be a first lien on the property, and shall be

due and payable by the steamship company or vessel.'

"The shippers object to the provision stated in italics above, apparently on the theory that an interim might thereby be permitted during which no carrier would assume liability other than as a warehouseman. This does not necessarily follow. There are, of course, circumstances and conditions existing at some ports where there is necessarily an intermediary between the inland carrier and the ocean carrier. But the provision objected to relates to the local arrangements existing at some ports by which the inland carrier makes delivery to the ocean carrier and the latter accepts the shipment for further transportation. Obviously, when the inland carrier shall have made a proper delivery to the connecting ocean carrier, the former is relieved from and the latter assumes the carrier liability. Delivery by the inland carrier to the ocean carrier in accordance with the legal custom or usage of the port, or arrangement between them, implies acceptance of the goods by the ocean carrier. A case in point is that of Washburn-Crosby Co. v. Boston & A. R. R., 180 Mass., 252, where a railroad company's pier was jointly used by it and a steamship company with which it formed a connection. The steamship company by an existing arrangement used and occupied a part of the pier for the purpose of receiving freight deposited upon it by the railroad company and intended for further transportation by the steamship line. It also appeared that the unloading of freight in such a manner was regarded by both companies as a delivery to the steamship company. A quantity of flour which the railroad company had unloaded on the pier to await transportation by the steamship company was destroyed by fire. Suit was brought against the railroad company for its value, and the question was whether the facts showed a delivery. In deciding the question the court said:

"'If, then, as might have been found, it was understood in advance that as soon as goods were left upon the wharf by the railroad the steamship company was free to take them at its pleasure and that it was expected to take notice of their presence and to assume responsibility for them without more special notification, the deposit of the flour on the wharf was an actual delivery without more.'

"It was held therefore that a delivery had been shown and that the railroad company was not liable. It by no means follows that the owner of the goods may not recover for the loss from the connecting carrier to whom they had been constructively delivered. He may pursue another in whom was the last actual possession. But if, as between the carriers themselves, the one to whom delivery has been constructively made for further carriage is the responsible party, there is no reason why that carrier should not be liable also to the owner of the goods. 1 Hutch. Carr. (3d Ed.), § 138.

"As we understand the law, the carriers may properly contract for the exemption contemplated in this clause. It does not appear from all the record that it is in any wise unreasonable and it is therefore approved."

87. Vogel v. Delaware, L. & W. R. Co. (Wisc. 1919), 171 N. W. 198.

IX.

ACTIONS AT LAW FOR DAMAGES.

1. Jurisdiction of Interstate Commerce Commission.
2. Jurisdiction of Courts.
3. Statute of Limitations.
4. Parties.
5. Pleading.
 —Counterclaims.
6. Burden of Proof.
7. Competency of Witnesses.
8. Admissibility of Evidence.
9. Judicial Notice.
10. Questions for Jury.
11. Argument of Counsel.
12. Instructions, Verdict, and New Trial.
13. Costs.
14. Appeal.

1. **Jurisdiction of Interstate Commerce Commission.** The Interstate Commerce Commission has no jurisdiction over loss ioss and damage claims. Hence it is not authorized to determine whether damage to a shipment of shingles was caused by the act of a carrier in reloading into two open cars.[1] However, the Interstate Commerce Commission has a very important part to play in loss and damage claims, since it appears to have power to prescribe the form of a bill of lading, and of course the legal provisions in the bill of lading have a great deal to do with the liability of a carrier with respect to the shipment that moves under that bill of lading. In discussing its jurisdiction over

1. New York Merc. Exch. v. B. & O. R. R.,, 36 I. C. C. 156; Kay Co. v. D. & R. G. R. R., 21 I. C. C., 239, 240; Buffalo Hardwood L. Co. v. B. & O. S. W. R. R., 21 I. C. C., 536, 538; L. & N. R. R. v. Scott, 133 Ky. 724, 729, 118 S W. 990.

bills of lading in the recent bill of lading investigation, 52 I. C. C. 671, the Commission said (p. 685): "The liability of common carriers for the loss of, or damage to, shipments rests upon definite legal principles, and the enforcement of such liability is not within the jurisdiction of the Interstate Commerce Commission. Lost or Damaged Freight Replacement, 53 I. C. C. 257. It cannot direct the payment of a loss and damage claim, since the failure to pay would not be a violation of the act to regulate commerce. Larkin Co. v. Erie & Western Transportation Co., 24 I. C. C. 645. The Commission is merely the instrument of the law. Its functions are administrative and quasi-judicial. Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act. Section 12 of the Act to Regulate Commerce as originally enacted, which defines the powers and authority of the Commission in broad terms provided: 'That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.' By the amendment of March 2, 1889, to this section it was provided: 'And the Commission is hereby authorized and required to execute and enforce the provisions of this Act.' By amendment to Section of the Act, effective June 18, 1910, it was made the duty of all common carriers, subject to the provisions of the Act 'to establish, observe, and enforce just and reasonable * * * regulations and practices affecting * * * the issuance, form, and sustance of * * * bills of lading. Under the provisions of Section 15 of the Act, as amended June 29, 1906, and June 18, 1910, the Commission is empowered, after full hearing upon a complaint made as provided in Section 13

of the Act, or under an order for investigation made upon its own initiative, to determine whether any regulation or practice is unjust or unreasonable, or injustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Act and 'to determine and prescribe what * * * regulation or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violations to the extent to which the Commission finds the same to exist.' Thus the Commission has power and authority under the Act to determine the reasonableness of rules, regulations, and practices of the carriers, and to require them to cease and desist from the enforcement of rules and regulations, and the continuance of practices found to be unreasonable or unjustly discriminatory, or unduly prejudicial. And herein lies the Commission's power to lay hands upon the 'issuance, form, and substance' of bills of lading. The Act specifically requires carriers subject thereto to issue bills of lading. The Commission has undoubted authority to enforce this requirement in a proper proceeding. It can require carriers to file with it the rules and regulations which they write into their bills of lading. It can, by due process, require that uniform rules and regulations be adopted by carriers subject to its jurisdiction. It can determine whether such are, in and of themselves, or as interpreted in the practices of the carriers, reasonable and nondiscriminatory, and, if otherwise, condemn them and prescribe reasonable rules and regulations, in which event the carriers must obey."

2. Jurisdiction of Courts. Under the Cummins Amendment the shipper is given two years within which to bring suit. Therefore any attempted limitation for a shorter period contained in any contract or tariff of a carrier is void. The Carmack Amendment to the Hepburn Act relating to the liability of common carriers of property in interstate commerce for loss or damage to such property, but which contains the proviso "that nothing in this section shall deprive any holder of such receipt of bill of lading any remedy or right of action which he has under existng law," leaves a shipper free to resort to the

laws of a state applicable to his contract.[2] It unquestionably is the law that state and federal courts have concurrent jurisdiction to enforce liability for loss or damage to an interstate

2. St. Louis & S. F. R. Co. v. Akard (Okla. 1916), 159 Pac. 344. Norfolk & S. R. Co. v. New Bern Iron Works & Supply Co. (N. C. 1916), 90 S. E. 149.

So far as loss and damage claims are concerned, the Commission has held that carriers should settle such claims within six months, in The Matter of Express Rates, 24 I. C. C. 380, 396. This ruilng was made with reference to express shipments. It is a question whether rail carriers may not be entitled to as long a period.

The state courts have concurrent jurisdiction with the federal courts of causes of action for injuries to interstate shipments of live stock, though such shipments are governed exclusively by the federal law. Baird Bros. v. Minneapolis & St. L. R. Co. (Ia. 1917), 165 N. W. 412.

Where the District Court's jurisdiction is doubtful, comity and uniformity of decision requires that a decision of a different judge of the same court shall be followed. Wells Fargo & Co. v. Cuneo, 241 Fed. 727.

Where there is an interstate shipment of goods, and they are damaged in transit, the superior court of the county of the of the destination of the shipment has jurisdiction of a suit by attachment for damages therefor against the initial nonresident carrier. Adair v. Atlantic Coast Line R. Co. (Ga. 1918), 94 S. E. 840.

In Adair v. Atlantic Coast Line R. Co. (Ga. 1918), 94 S. E. 840, the court said, pp. 840, 841:

"In the case of Burns v. Louisville & Nashville Railroad Co., 6 Ga. App. 614, 65 S. E. 582, Judge Russell, speaking for this court, said:

"'Where a carrier fails to deliver the goods at destination, or delivers them in bad order, section 2334 of the Civil Code [of 1895] confers jurisdiction of an action for the resulting damages on the courts of the county where the failure to deliver occurred (i e., the county of the destination of the shipment), whether the action be ex contractu or ex delicto. If the action proceed ex delicto the carrier does not defeat the jurisdiction by showing that, physically considered, the loss or damage did not occur in the county where the delivery in good order should have been made. The failure to deliver at destination in good order is a breach of the contract of carriage and also a breach of the carrier's public duty (the latter a tort), both theoretically located at the place of performance—the destination. Brooke v. Nashville, etc., Ry. Co., 5 Ga. App. 253 [62 S. E. 1002], distinguishing and affirming Brooke v. L. & N. R. Co., 3 Ga. App. 492 [60 S. E. 218]; L. & N. R. Co. v. Warfield 129 Ga. 473 [59 S. E. 2341]; Lytle v. Southern R. Co., 3 Ga. App. 222 [59 S. E. 595].' See, also, L. & N. R. Co. v Burns, 9 Ga. App. 242, 70 S. E. 1112."

"See, also, L. & N. R. Co. v. Burns, 9 Ga. App. 242, 70 S. E. 1112."

A court cannot properly pass on the question of negligence, except in cases where the facts are such that all reasonable men would be likely to

shipment, and if the amount involved is below $3,000 the state courts have exclusive jurisdiction. Where the construction of a law of the United States, or a right thereunder is involved, a citizen has a right to appeal to a United States court, irrespective

draw from them the same inferences. Snyder v. King (Mich. 1917), 165 N. W. 840.

The various amendments to the Interstate Commerce Act have not abridged the jurisdiction of either the state or federal courts to entertain suits for loss and damage to freight. In some instances state rules of evidence and procedure have been modified, and of course, state courts are bound by such modifications, but the right of the shipper to bring the suit in the first instance is not abrogated in any way. Thus section 22 of the Interstate Commerce Act permits an action to be brought in a state court for the wrongful failure of a terminal carrier to deliver an interstate shipment. W. & A. R. Co. v. White Provision Co. (Ga.), 82 S. E. 644, 646. So the liability fixed by the Carmack Amendment, may be enforced by a state court Elliott v. C. M. & St. P. Ry. Co. (So. Dak. 1915), 150 N. W. 777, 778.

A state court has jurisdiction of a shipper's claim for damages arising from the illegal refusal of the terminal carrier to deliver freight on which the proper charges had been paid, and suit could be brought against the final carrier without joining the initial carrier. W. & A. R. Co. v. White Provision Co. (Ga.), 82 S. E. 644, 645. Therefore the fact that the Interstate Commerce Commission may have recommended the payment of special damage which flows from violation of a federal law is no reason why the state court may not take cognizance of a suit based in part upon another result of that act which, when connected with many other acts of a different nature, will show a willful and malicious purpose, and give rise to this common-law cause of action. L. & N. R. Co. v. Ohio Valley Tie Co. (Ky.), 170 S. W. 633, 642. So an action for damages for the failure of a railroad to properly run a special train as agreed can be brought in a state court and application does not first have to be made to the Interstate Commerce Commission. Burns v. Nevada-California-Oregon Ry. (Nev. 1915), 145 Pac. 926, 928. But if the Commission had acted upon a live stock contract, and approved it, a shipper bringing suit thereunder must first resort to the Commission. Until it does affirmatively appear that the Commission acted upon it, the courts are free to deal with it. Norfolk & W. Ry. Co. v. A. J. Steele & Son (Virginia 1915), 86 S. E. 124, 126. However, since the uniform live stock contract has never been approved by the Interstate Commerce Commission, or referred to, or made a part of a carrier's tariff, a state court has authority to declare one of its provisions illegal and invalid. Norfolk & W. Ry. Co. v. A. J. Steele & Son (Virginia 1915), 86 S. E. 124, 126. A suit against a carrier for the negligent handling of a shipment is transitory and may be brought against the carrier in any state where proper service may be had. Coy v.

of the amount involved. The Cummins Amendment, being a federal law, it is very evident that a claimant would have the right in a suit brought on a right prescribed by that law to bring suit in a United States court irrespective of the amount

St. L. & S. F. R. Co. (Mo. 1915), 172 S. W. 447. And such a suit is governed by the law of the place where the negligence occurred. Coy v. St. L. & S. F. R. Co. (Mo. 1915), 172 S. W. 447.

In any case where an action is brought under state statutes modeled upon the Interstate Commerce Act, decisions of the Supreme Court of the United States, construing the Interstate Act will have persuasive authority. Southern Pac. Co. v. Superior Court (Cal. 1915), 150 Pac. 397, 403. So section 9 of the original Interstate Commerce Act (24 U. S. Stats. at Large 379, c. 104), limiting jurisdiction to federal courts, relates to actions in which it is claimed the carrier has violated the Act by doing something which it forbids or has neglected to do; something which it commands should be done. It does not have reference to actions brought under the Carmack amendment, enforcing liability of the initial carrier for damages caused by negligent carriage, or to actions for such damages not brought under the Carmack amendment. Of such actions state courts have jurisdiction. Smeltzer v. St. Louis & S. F. R. Co. (C. C.) 168 Fed. 420; Ft. Smith & W. R. Co. v. Awbrey & Semple, 39 Okl. 270, 134 Pac. 1117. In Kansas City S. R. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, and in C. B. Q. Ry. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323 the Supreme Court of the United States decided writs of error to state courts in actions brought under the Carmack amendment without intimating that state courts had no jurisdiction. State courts have jurisdiction to enforce federal laws unless it is withheld directly or by necessary implication. Bichlmeier v. Minneapolis, St. P. & S. S. M. Ry. Co., 150 N. W. 508, 509.

The attorney for an interstate shipper of live stock had considerable correspondence with the carrier's agent regarding a claim for damages, but made no agreement or promise that suit would not be instituted before the expiration of six months, and the agent never admitted liability or agreed not to interpose the defense afforded by a provision of the contract, requiring actions to be brought within six months. In one letter the agent stated that he did not think there would be any necessity of filing suit, but that he wanted an opportunity to investigate. About 50 days before the six months was up the attorney wrote the agent that the time for bringing suit was getting short and that if defendant was going to pay he wanted to know it, to which the agent replied that he was waiting to hear from a connecting carrier and as soon as he heard from it he would be in a position to advise the attorney definitely. About five days before the six months expired the agent wrote the shipper that he was unable to give any degree of satisfaction as he was still waiting for the connecting carrier, and the shipper replied three days before the expiration of such

involved. To meet this situation Section 20 of the Interstate Commerce Act provides that no suit brought in any state court on a loss and damage claim shall be removed to any court of the United States when the matter in controversy does not

time that he could proceed against the carrier as the initial carrier but would prefer to adjust the matter without a lawsuit. *Held,* that there was no waiver by the carrier of the provision limiting the time to sue, nor anything estopping it from relying in such provision. Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co. (Mo. 1918), 200 S. W. 109.

Where a shipping contract covering an interstate shipment of live stock provided that no action for damages should be sustained unless brought within six months, the carrier's right to rely on such provision of the contract could not be lost by waiver or estoppel, whether the acts relied on as constituting the waiver or estoppel were committed before or after the expiration of the six months, as the purpose of the commerce act is to absolutely destroy discriminations in interstate commerce no matter how conceived, or by what plan, scheme, or device they may be sought to be accomplished, and a discrimination would result from a waiver before the time limit had elapsed as well as by waiver after it had elapsed. Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co. (Mo. 1918), 200 S. W. 109.

A pedigreed chicken worth $300.00 was placed in a box covered with slats and transported under a rate limiting liability to $50.00 in value. In holding the limitation void under the Cummins Amendment and upholding a verdict for claimant, the court said:

"State and federal courts have concurrent jurisdiction of suits to enforce liability against an interstate carrier under the Interstate Commerce Act if the amount involved is sufficiently large to give federal jurisdiction, and the state courts have exclusive jurisdiction if the amount claimed is below federal jurisdiction. See cases cited in note on page 9308 of volume 8, U. S. Statutes Annotated." McCormick v. So. Exp. Co. (W. Va. 1917), 93 S. E. 1048, 1049.

But see Hall v. Pa. R. R. Co. (Pa. 1917), 100 Atl. 1035, 1042.

The method of practice in the state courts has not been disturbed by the Cummins Amendment, except as it may be affected by questions of substantive law laid down by the federal courts. That is motions for continuance, change of venue, forms of pleading and the like are still in the exclusive control of the state courts and questions of this character depend upon the facts in each individual case, and the decisions of the particular state with reference thereto.

The liability of the carrier however in a question of substantive law is governed of course by the Cummins Amendment and the decisions of the federal courts.

The courts have jurisdiction over a suit by a shipper to compel a railroad company to furnish cars as a shipper has a remedy by action for a carrier's refusal to accept proper shipments or supply reasonably

exceed, exclusive of interest and costs, the sum or value of $3,000.00.[2½] In this connection sight must not be lost of the fact that the railroads are now under federal control. The Director General of Railroads (April 18, 1918) issued a ruling prescribing the manner in which suits shall be brought against carriers for damage to interstate shipments. This is his famous order 18-A, which is as follows: "It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at

adequate facilities. Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 Fed. 705.

2½. Emery & Co. v. Am. Ref. Tr. Co., 38 Sup. Ct. 414.

A claim for loss or damage to an interstate shipment is not a suit under the Interstate Commerce Act, so a suit for damages by a shipper of peaches against a refrigerator line which had a contract with a railroad to ice its cars, and which in this particular case had failed to do so properly, is not a suit under the Interstate Commerce Act, and a federal court has no jurisdiction of it unless the amount involved exceeds $3,000. Emery & Co. v. American Refrigerator Transit Co., 38 Sup. Ct. 414.

The Act of Congress of August 29, 1916, empowering the President to take possession of systems of transportation, and the Act of Congress of March 21, 1918, as to operation of transportation systems under federal control, general order No. 18 of the Director General of Railroads, general order No. 18A, and general order No. 26, which relate only to the remedy of a person injured and desiring to sue, are not subject to the objection that they are ex post facto or retroactive. Rhodes v. Tatum (Tex. 1918), 206 S. W. 114.

One injured in New Mexico suing a railroad in Texas could not by mandamus compel immediate trial of his action contrary to general orders Nos. 18, 18A and 26 of the Director General of the Railways, in the absence of compliance with No. 26, permitting application to the Director General for relief in event of unnecessary hardship by postponement according to those orders. Rhodes v. Tatum (Tex. 1918), 206 S. W. 114.

In this connection it may be noted that the validity of order 18A is extremely doubtful. While one of the lower federal courts has held it valid, another has held it void, and the state courts seem about evenly divided. It is very probable, however, that in view of section 10 of the Federal Control Act, the Supreme Court of the United States might hold it void.

The courts have jurisdiction over a suit by a shipper to compel a railroad company to furnish cars, as a shipper has a remedy by action for a carrier's refusal to accept proper shipments or supply reasonably adequate facilities. Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., 253 Fed. 705

the time of the accrual of the cause of action or in the county or district where the cause of action arose."[2]

3. The most important question confronting the state courts at the present time is Order 18-A of the Director General of Railroads, specifying that suits against carriers shall only be brought in the county or district where the plaintiff resides or where the damage occurred. A great ado has been made by the administration over the decision in Wainright v. Penn. R. R., 253 Fed. 459, as sustaining the validity of this order. In this case a suit for personal injury was brought as an original action in the United States Court, in a district other than where the plaintiff resided. Judge Trieber, although he sustained order 18-A, expressly stated he did not pass on the validity of this order as applied to state courts. In Wainright v. Pennsylvania R. Co., 253 Fed. 459, the court said, p. 461: "At the outset of this opinion it is proper to state that, as this action was originally instituted in a court of the United States, the question whether Congress may authorize the general orders in question to apply to the courts of the states is not involved, and therefore cannot be determined in this proceeding. What is stated in this opinion is necessarily intended to apply solely to actions instituted in the national courts. Whether, under the war power, Congress may enact laws affecting the maintenance of actions in the state courts can only be determined when it properly comes before the court. To express an opinion on that question in the instant case would be clearly obiter, and the court, for this reason, limits this opinion to actions instituted in the national courts." While another federal court has upheld the order in a personal injury case, it has also been held void by the district court of Nebraska in a similar case. It has also been held void as applied to a suit for loss and damage originally brought in a state court in New York; where the injury occurred prior to the promulgation of the order. The validity of the order will never be definitely settled until it reaches the Supreme Court of the United States. It is submitted, however, that as applied to suits brought as original actions in state courts it is unconstitutional and void if construed to apply to them. It is an arbitrary and illegal interference with the sovereign powers of the states. In innumerable cases it has worked considerable hardship and unjust discrimination against shippers who have had valid claims but have been so situated that the ywere neither able to sue where they resided nor gifted with omniscience so as to determine on what particular spot of the globe injury to their shipment occurred. The President and his agents had no power, under Act. Cong. Aug. 29, 1916, § 1, or Act. Cong. March 21, 1918, §§ 1, 10 (U. S. Comp. St. 1918, §§ 3115¾a 3115¾j) to make an order whereby a right of action already existing against a railroad would be extinguished or cut off. Benjamin Moore & Co. v. Atchison, T. & S. F. Ry. Co., 174 N. Y. S. 60.

The President or his agents had no power, under Act. Cong. March 21, 1918, § 10 (U. S. Comp. St. 1918, § 3115¾j), to make orders affecting the jurisdiction of the state courts

3. Statute of Limitations. Prior to the passage of the Cummins Amendment, the time within which a claimant had to bring suit for loss or damage to a shipment depended, gen-

of actions against railroads, or affecting the right to maintain actions therein. Benjamin Moore & Co. v. Atchison, T. & S. F. Ry. Co., 174 N. Y. S. 60.

Amended regulation No. 18a, promulgated by the Director General of Railroads April 18, 1918, providing that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose," as applied to suits in the federal courts, is within the authority conferred on the President by Act March 21, 1918. Wainwright v. Pennsylvania R. Co., 253 Fed. 459.

Under section 12 of article 7 of the Constitution, providing that the county court, coextensive with the county, shall have original jurisdiction in all the probate matters, and until otherwise provided by law shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding $1,000, exclusive of interest, held, in an action to recover damages for the negligent delay in a shipment of live stock, resulting in a loss by shrinkage and a decline in the market, that interest on the damages sustained should be excluded in determining the maximum jurisdictional amount for which the action may be brought in the county court. St. Louis & S. F. Ry. Co. v. Ladd (Okla. 1918), 178 Pac. 125.

Suit against carrier while under federal control, brought, after promulgation of and contrary to General Orders Nos. 18 and 18a of the Director General of Railroads, in a county or district other than where the cause of action arose, or where plaintiff resided when it accrued, will be dismissed. Cocker v. New York, O. & W. Ry. Co., 253 Fed. 676.

Under circumstances of case, held, trial of action against railroad, brought in New York, for injury, at Scranton, Pa., of a boy then residing there, should be stayed, under General Order No. 26 of the Director General of Railroads, Cocker v. New York, O. & W. Ry. Co., 253 Fed. 676.

Under General Order No. 26 of Director General of Railroads, as to staying trial, on showing that just interests of government will be prejudiced by present trial of action against carrier under federal control pending in a county or district other than where the cause of action arose or plaintiff then resided, but allowing a new action in the other county or district, stay depends on the circumstances of each case; the primary consideration being the situation of the government relative to railroad witnesses leaving their work. Cocker v. New York, O. & W. Ry. Co., 253 Fed. 676; also see Harnick v. Penn. R. R. 253 Fed. —

When a wrong complained of amounts to a conversion, the injured party has the right to so treat it, and to sue for the value of the property. Panhandle & S. F. Ry. Co. v. Talmage (Tex. 1918), 206 S. W. 862.

erally speaking, upon the law of the state where the action was brought. In many cases, however, the carriers had provisions in the bill of lading specifying the time within which suit had

Where a contract for interstate shipment of live stock limited time for suit to six months, an action by the partnership, to which the cause of action accrued, begun after the six-month period, cannot be deemed a "continuation," within the Iowa code, of an action on the same cause begun within the six-month period by a member of the firm, for the two were distinct legal entities. Marks & Shields v. Chicago, R. I. & P. Ry. Co. (Ia. 1918), 169 N. W. 764.

The provision of a valid interstate live stock shipment contract that suits to recover for injury or delay to shipments must be begun within 91 days thereafter cannot be waived by a carrier. Cudahy Packing Co. v. Missouri, K. & T. Ry. Co. of Tex. (Tex. 1918), 206 S. W. 854.

The carrier contended as a defense in a suit for damages that the claimant, a shipper of live stock, had crowded several l. c. l. shipments, belonging to other people, into one carload, which he had shipped in his own name in order to obtain free transportation as caretaker. It was contended that this transaction was illegal under the Interstate Commerce Act. In holding even if it was, it would not bar his suit for damages for injury to his shipment, the court said:

"The fact that a contract of shipment is invalid as violating the Interstate Commerce Law, prohibiting discrimination in rates, does not operate as a bar to an action to recover for loss of or injury to the goods by negligence or for injury due to delay in transportation, or for damages caused by willfully misrouting the goods so that the shipper is compelled to pay a much higher rate of freight. 10 C. J. 513, § 831; Merchants' Cotton-Press, etc., Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; H. & T. C. Ry. Co. v Commons, 160 S W. 1107. And it is specifically held that an aggregation of shipments by various owners, in order to obtain the benefit of carload rates, does not constitute discrimination nor violate the Interstate Commerce Law prohibiting the granting of preferences and special privileges. Interstate Commerce Commission v. Delaware, L. & W. Ry. Co., 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448." Chicago, R I. & G. Ry. Co. v. Manby (Tex. 1918), 207 S. W. 157, 158.

Under the Carmack Amendment which furnishes the exclusive rule on the subject of the liability of the carrier under contracts for interstate shipment, a stipulation in a contract for an interstate shipment of live stock, providing that no suit or action against the carrier for loss, damage, or delay to or of the live stock shipped under the contract, shall be sustainable in any court of law or equity, "unless such suit or action is commenced within six months next after the cause of action shall occur," is a reasonable provision, and binding upon the parties to such contract. St. Louis, I. O. & S. Ry. Co. v. Bentley (Okla. 1918), 176 Pac. 250.

The court was not without jurisdiction to declare a lien against the property of defendant railway company pursuant to the Arkansas statutes, or to render a judgment for damages although at the time of the trial and of accrual of cause of action the railway was being operated by a receiver appointed by a United States court where receivership was pending in view of Act Cong. March 3, 1887, § 3, as amended by Act Cong. Aug. 13, 1888, § 3, which is now embraced in Judicial Code, § 66 (U. S. Comp. St. § 1048). Bush v. Southern Grocery Co. (Ark. 1918), 208 S. W. 299, 300.

To restrain enforcement of a default judgment, it must appear that the judgment was void on the face of the record or that the defendant was not served and had a meritorious defense which it failed to present without fault. Baker v. Memphis, D. & G. Ry. Co. (Tex. 1918), 208 S. W. 182.

Where a judgment in justice court recited that the defendant was duly and legally cited, and it did not appear from any other portion of the record that the recital was untrue, the enforcement of the judgment cannot be restrained unless defendant shows a meritorious defense. Baker v. Mamphis, D. & G. Ry. Co. (Tex. 1918), 208 S. W. 182.

The summons having been issued under the second amendment petition, which was against a corporation and individuals, so that the petitions preceding are not to be regarded as prior foundations of the suit, the fact that the first amended petition was against the corporation alone can have no effect on the question of jurisdiction over the individuals residing in county other than that of the suit. Riffe v. Wabash Ry. Co. (Mo. 1918), 207 S. W. 78.

A claim for loss or damage to an interstate shipment is not a suit under the Interstate Commerce Act, so a suit for damages by a shipper of peaches against a refrigerator line which had a contract with a railroad to ice its cars, and which in this particular case had failed to do so properly, is not a suit under the Interstate Commerce Act, and a federal court has no jurisdiction of it unless the amount involved exceeds $3,000. Emery & Co. v. American Refrigerator Transit Co., 38 Sup. Ct. 414. The Act of Congress of August 29, 1916, empowering the President to take possession of systems of transportation, and the Act of Congress of March 21, 1918, as to operation of transportation systems under federal control, general order No. 18 of the Director General of Railroads, general order No. 18A, and general order No. 26, which relate only to the remedy of a person injured and desiring to sue, are not subject to the objection that they are ex post facto or retroactive. Rhodes v. Tatum (Tex. 1918), 206 S. W. 114 One injured in New Mexico suing a railroad in Texas could not by mandamus compel immediate trial of his action contrary to general orders Nos 18, 18A and 26 of the Director General of the Railways, in the absence of compliance with No. 26, permitting application to the Director General for relief in event of unnecessary hardship by postponement according to those orders. Rhodes v. Tatum (Tex. 1918), 206 S. W. 114. In this connection it may be noted that the validity of order 18A is extremely doubtful. While one of the lower federal courts has held it valid, an-

to be brought. Generally these provisions were held valid.[4] The Cummins Amendment, however, provides "that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period * * * for the institution of suits than two years * * *." The Uniform Bill of Lading provides that "suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of cailure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." This provision being authorized by the Cummins Amendment must be considered as valid and binding. This provision was generally adopted by the carriers after the passage of the first Cummins Amendment, effective June 2, 1915.

other has held it void, and the state courts seem about evenly divided. It is very probable, however, that in view of section 10 of the Federal Control Act, the Supreme Court of the United States might hold it void.

4. A. T. & S. F. Ry. Co. v. White (Tex. 1916), 188 S. W. 714; A. T. & S. F. Ry. Co.. v. Smith (Tex. 1916), 189 S. W. 70; Cherokee Sawmill Co. v. N. C. & St. L. Ry. Co. (Ga. 1917), 91 S. E. 790; C. R. I. & P. Ry. Co. v. Paden (Okla. 1917), 162 Pac. 727; St. L. & S. F. Ry. Co. v. Taliaferro (Okla. 1917), 168 Pac. 438; I. C. R. Co. v. Rogers & Hurdle (Miss. 1917), 76 So. 686; C. R. I. & P. Ry. Co. v. Shroyer (Tex. 1917), 197 S. W. 773; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; So. Exp. Co. v. Oliver (Ga. 1917), 93 S. E. 109; Blair-Baker Horse Co. v. A. T. & S. F. Ry. Co. (Mo. 1918), 200 S. W. 109; Ezell v. Midland Valley R. Co. (Okla. 1918), 174 Pac. 781; Overstreet et al. v. Wichita Falls & N. W. R. R. Co. (Okla. 1918), 175 Pac. 354; A. T. & S. F. Ry. Co. v. Cooper (Okla. 1918), 175 Pac. 539; Tuller v. C. R. I. & P. Ry. Co. (Ia. 1918), 168 N. W. 301; Lynch v. Co. Exp. Co. (18 Ga.), 761, 90 S. E. 655.

While the Cummins Amendment allows the carrier to provide suits cannot be brought after the expiration of two years, if it does not so provide, the state statute of limitations will apply. Rev. St. 1911, art. 5688, subd. 1, providing that actions for debt or contracts in writing shall be commenced within four years, applies to an action to recover for breach of a bill of lading. Texas & P. Ry. Co. v. R. W. Williamson & Co. (Tex. 1916), 187 S. W. 354. Where cotton was shipped on a through bill of lading from Texas via New Orlenas to Liverpool, England, and a portion of it destroyed by fire while in carrier's possession, the consignor not being under duty to keep track of the shipment while in transit, the statute of limitations did not begin to run till shippers, not being negligent, actually learned of the nondelivery. Texas & P. Ry. Co. v. R. W. Williamson & Co. (Tex. 1916), 187 S. W. 354.

4. Parties. Many cases have come up as to who is the proper party to bring suit for loss or damage.[5] In order to maintain an action against a carrier for the recovery of damages

5. Sometimes it is difficult to determine who is the proper party to maintain a suit for loss and damage. It is well settled, however, that the assignee or transferee of a bill of lading may sue upon any cause of action which is supported by the terms of that contract. Canby v. Merchants' & Miners' Transp. Co. (Ga. 1915), 85 S. E. 361, 362; Watson v. Union Pac. R. Co. (Mo. 1915), 178 S. W. 871, 873; St. L. & S. F. R. R v. Mounts (Okla. 1914), 144 Pac. 1036. And no formal assignment by a partner of his interest in a partnership is necessary to enable another partner to sue alone for injury thereto. Any action showing an intent to transfer the interest to the suing partner is sufficient. Hardesty v. Atchison, T. & S. F. Ry. Co. (Mo. 1915), 179 S. W. 725. But where in an action for damage to cattle from their escape from defendant railroad's receiving pens, claimant sued both for injuries to animals owned by him individually and those owned by him in partnership with another, failing to show that his partner had assigned to him his interest in the cattle, only showing that he himself had agreed to go ahead and sue for the whole damage to the whole shipment, he could not maintain his action for damage to the partnership live stock, since there was no showing of his partner's intention to transfer his interest in the cattle or his interest in the claim for damages to the plaintiff. Hartesty v. Atchison,, T. & S. F. Ry. Co. (Mo. 1915), 179 S. W. 725. So a bailee has a right to enforce the liability of a carrier for the loss of goods. Litzenberg v. Cole, 151 N. Y. Suppl. 687, 688.

While the shipper of goods delivered by her through an expressman to a steamship company for transportation could sue in her own name as an undisclosed principal from whom the consideration moved, to enforce the rights in relation to the goods the expressman acquired when acting for her, she could not affirm the contract of transportation in part and disaffirm in part, as by repudiating, in her suit for misdelivery, the bill of lading which the steamship issued to the expressman without objection and which gave the address of the consignee different from that marked on the shipment. Porter v. Oceanic S. S. Co. of Savannah (Mass. 1916) 111 N. E. 864.

In an action against a common carrier, whereby it is sought to recover damages for the loss of perishable goods intrusted to such carrier for shipment, alleged to have occasioned through the negligent handling of and unreasonable delay by the carrier in transporting such goods, the declaration is not demurrable for failing to allege that the claimant was the owner of the goods. The consignor has the implied right to bring such action by reason of his delivery of the goods by him to the carrier and its receipt of them for carriage, especially when it is made to appear from the allegations of the declaration that

occasioned by negligence in the transportation or delivery of goods, either ex contractu or ex delicto, the plaintiff does not have to be the absolute owner of the goods. If the plaintiff has

the consignee was to receive and sell the goods for the claimant as the consignor. Aultman v. Atlantic Coast Line R. Co. (Fla. 1916), 71 So. 283.

Where claimant partnership made a large number of shipments of intoxicating liquors by defendant express company by separate contracts for each shipment, claimant's recovery in an action for the conversion of part of the shipments was no bar to a subsequent action for the conversion of the other shipment, because of a lack of identity and of subject-matter and demand in the two actions. Danciger v. American Express Co. (Mo. 1915), 179 S. W. 806.

Where goods were shipped by a manufacturer upon the order of a seller to different consignees, each purchase of goods being put in a separate package with the name marked upon same and the bill of lading taken from the railroad in the consignee's name for such goods, title to the goods passed to the purchaser upon delivery to the railroad, and when the goods were destroyed each separate consignee had a separate individual cause of action against the carrier, and the manufacturer could not maintain such an action himself. Alabama Great Southern Ry. Co. v. Aultman & Co. (Ala. 1914), 67 So. 589, 590.

But a lumber company which is the purchaser of standing timber cannot sue a railroad which has built a spur into the timber land under a contract with the owner thereof, for failure to promptly furnish cars thereon for loading. Beaumont, S. L. & W. Ry. Co. v. Moore (Texas 1915), 174 S. W. 844.

Since the consignee is presumed to be the owner of the property under an open bill of lading the shipper can not recover for negligence in transporting in consideration of increased freight charges in the absence of proof that he paid the freight or obtained some interest in the property. Ellington & Guy v. Norfolk Southern R. Co. (N. C. 1915), 86 S. E. 693.

But a consignor, who has made a special contract with a carrier to transport goods, may maintain an action against the carrier for failure to deliver them within a reasonable time, or for their loss or injury, even where title passed to the consignee at delivery of the goods to the carrier. Norfolk Southern R. Co. v. Norfolk Trunkers' Exchange (Va. 1916), 88 S. E. 318.

So when the consignee pays the consignor for a shipment he takes all the right and title of the consignor to the same, and therefore the consignor has no right to assign a claim for the loss of such shipment to a third party. Southern Ry. Co. v. Brewster, 68 So. 111.

Where suit is brought for injury to freight against a railroad operating by receivers, it is not necessary for plaintiff to prove the appointment of the receivers if his complaint properly alleges their appointment and the railroad does not specifically deny such statement. Kansas City M. &

O. Ry. Co. v. Cave (Texas 1915), 174 S. W. 872, 873.

But a rule where cases of eggs are received at shipping point and receipted for on other than order bills of lading as in apparent good order (contests and conditions of package unknown) and arrive at destination in the same apparent good condition, and show no external evidence of damage, no inspection of contents of such cases will be permitted before delivery thereof to consignee, and he will be required to accept and receipt for them subject to the same conditions under which the shipment was received for transportation, viz., as in apparent good order (contents and condition of package unknown). This can not, of course, bar consignee from suing for, and upon due proof from obtaining compensation for loss or damage caused by, the negligence of the carrier, even though undisclosed by the joint examination at delivery point, and is not restricted to cases showing external evidence of damage. N. Y. Merc. Exch. v. B. & O. R. R., 36 I. C. C., 156, 160.

It being doubtful whether a sale was complete on delivery of goods to a carrier, or only on delivery at destination, and consignee having released the carrier from liability in the consignor's favor, and authorized settlement with him, the consignor could maintain an action for delay in transportation. United States Express Co. v. Rea, (Ark. 1915), 181 S. W. 888.

Where a contract of sale allows the vendee and consignee to refuse the goods if not in good condition on arrival, the consignor's title is not divested by delivery to the carrier, and he may sue the carrier for injury to such goods. Yazoo & M. V. R. Co. v. Solomon (Ark. 1916), 184 S. W. 418.

In an action by a shipper to recover for loss of goods under the Interstate Commerce Act, requiring any interstate carrier to issue a bill of lading, and making it and any other carrier to which it may be delivered liable "to the lawful holder thereof" for any loss, the holding of the bill of lading is not prerequisite to such right of action. Pecos v. N. T. Ry. v. Meyer (Tex. 1913), 155 S. W. 309, 312.

But the statute extends its remedy directly against the carrier to whom goods are delivered for shipment in behalf of such shipper, or one who has succeeded to his rights. The declaration is not subject to demurrer for failing to allege that a receipt or bill of lading was issued for the goods, and that the claimant was the lawful holder of such bill of lading. Aultman v. Atlantic Coast Line R. Co. (Fla. 1916), 71 So. 283.

Where claimant undertook to perform the duty of giving his deceased mother a decent burial, and assumed responsibility for all funeral expenses and the cost of transportation of the corpse, he was the proper party to sue a carrier for violating his right to control the body for the purpose of a decent burial by so mishandling the box in his presence as to bend down the thumbscrews and burst open the sides of the box. Wall v. St. Louis & S. F. R. Co. (Mo. 1916), 182 S. W. 1057, 1058.

It has been said a suit on a transportation contract is properly brought in the name of the consignor, whether he is the owner or not. J. A. Lamy Mfg. Co. v. Missouri Pac. Ry. Co. (Mo. 1916), 182 S. W. 131.

So the Carmack Amendment, pro-

viding that any common carrier receiving property for transportation from a point in one state to a point in another shall be liable to the "lawful holder" of the bill of lading, authorizes a recovery by the person beneficially interested in the shipment, though he may not be in possession of the bill of lading. Norfolk Southern R. Co. v. Norfolk Truckers' Exchange (Va. 1916), 88 S. E. 318.

And any lawful holder of a bill of lading, issued by the initial carrier pursuant to the Carmack Amendment, upon receiving property for interstate transportation, may maintain an action for any loss, damage, or injury to such property caused by any connecting carrier to whom the goods are delivered. Carr. v. Penn. R. Co. (N. J. 1916), 96 Atl. 588.

Where plaintiffs pleaded breach of an interstate railroad company's contract to transport, feed, and fatten sheep in transit, and then retransport them to market for sale, and also pleaded wrongful appropriation of the proceeds of the sale to the carrier's use, the fact that the carrier may not have had authority under its filed tariffs to feed and fatten the sheep in transit did not entitle it to judgment on the pleading. Klink v. Chicago, R. I. & P. Ry. Co., 219 Fed. 457

Each case must be decided with reference to its own particular facts. Thus, while a seller agreed to deliver a diamond ring to a purchaser which was stolen from the express company while in transportation, the seller is the proper party to maintain an action for the loss. Conroy v. Barrett, 158 N. Y. S., 549, 550.

Though a contract was made by an agent who did not disclose his principal, the principal is the proper party in interest, and may maintain action for breach of the contract. Levy v. Nevada-California-Oregon Ry. (Ore. 1916), 160 Pac. 808.

Upon shipment of goods through a carrier to a third party and on delivery to the shipper of the bill of lading, the consignee is prima facie the owner of the property. King v. Van Slack (Mich. 1916), 159 N. W. 157.

Where a shipper, who delivered to a bank a genuine bill of lading with the draft attached, receiving credit therefor, uttered a forged bill of lading, which he transferred to a third person, the fact that the forged bill of lading with draft attached evidenced a sale, and as between the shipper and a third person might operate to pass title, will not defeat the bank's paramount title. New York Cent. & H. R. R. Co. v. Bank of Holly Springs, 236 Fed. 562.

While the holder of a negotiable instrument circulating as money need not look beyond the instrument, and his right to enforce it will not be defeated by anything short of bad faith, a bill of lading, which is regarded as representing articles of merchandise in the possession of the carrier, stands on a different basis, though by transfer of the bill of lading there is a symbolic transfer of the property in the possession of the carrier. New York Cent. & H. R. R. Co. v. Bank of Holly Springs, 236 Fed. 562.

Where bills of lading to shipper's order for cotton were transferred to a bank, which had a lien on the cotton, the transfer, though the bills of lading were unindorsed, was a legal transfer of the cotton; that being the intention of the parties. New York

Cent. & H. R. R. Co. v. Bank of Holly Springs, 236 Fed. 562.

Where shipper, under an executory contract of sale providing for payment on delivery, title to remain in shipper until payment, placed apples in a freight car designated by buyer, with the consent of defendant railroad, before payment by the buyer, title remained in shipper; there being no absolute delivery such as would waive condition of payment in advance. Wilson v. International Ry. Co., 160 N. Y. S. 367.

Where consignee of grain deposited bill of lading with carrier's agent at board of trade on arrival of the grain, and sold the grain, giving an order misdirected to another carrier, which issued a new bill, and the purchaser defaulted on his check, and the consignee notified the carrier to hold the grain, but instead it delivered it to the other carrier, the consignee had a right of action based on the right of stoppage in transitu, the purchaser not having possession of the bill of lading so as to make his transfer valid under St. 1915 § 4425, as to transfer without indorsement, and the right of stoppage in transitu existing in the consignee's favor against the carrier until either actual or constructive possession passed to the purchaser. Bell v. Chicago & N. W. Ry. Co. (Wis. 1916), 159 N. W. 914.

Where a seller, as collateral security for a note, transferred to the holder the bill of lading and invoice for goods sold, to enable it to receive the purchase price thereof, the account was transferred absolutely; the seller retaining no contingent interest in it. Brown Bros. Co. v. Smith Bros. Co., 231 Fed. 475.

A notice given by a bank, to which the seller had transferred a bill of lading and invoice, to the buyer that remittance was to be made directly to the bank, is substantially the same as notice to the buyer that the account had been pledged. Brown Bros. Co. v. Smith Bros. Co., 231 Fed. 475.

In an assignee's action for damages for failure to deliver an interstate shipment of bran, the bill of lading for which was issued to shipper to notify arrival, the fact that a grain company on whose request the bran was delivered to a lumber company had bought grain from plaintiff and had taken delivery without payment, in view of the fact that the shipments it had taken were not accompanied by bills of lading and did not require delivery on the shipper's order and delivery of the bill of lading, did not show the grain company's authority from plaintiff to make the request. Kemper Mill Co. v. Missouri Pac. Ry. Co. (Mo. 1916), 186 S. W. 8.

Where the contract has been partly performed, recognized, or ratified by a corporation for whom in fact it was made, suit may be brought by such corporation thereon, notwithstanding that the contract was made in a name other than the true name of the corporation. W. B. Clarkson & Co. v. Gans. S. S. Line (Tex. 1916), 187 S. W. 1106

A joint owner of a shipment of live stock was properly joined as plaintiff in a suit for damages to the shipment; nothing in the Carmack Amendment depriving him of his right to join in the suit and recover. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

The general rule is that, where goods are shipped on an open bill of lading, the title passes to the con-

a special interest therein and his legal rights have been invaded, that would entitle him to maintain the action.[6] Where goods are intrusted to a carrier for transportation and delivery, the carrier thereby has notice of the interest of both the consignor and the consignee; and, if either suffers an injury through the

signee when they are delivered to the carrier, and any ensuing damage must be recovered by him. Aydlett v. Norfolk-Southern R. Co. (N. C. 1916), 89 S. E. 1000.

Notwithstanding such rule, it is open to the consignor to show that the goods were shipped on consignment, or that by agreement between himself and the consignee the title has revested in him while the goods were in transitu, and that he has a pecuniary interest in the proper performance of the contract of shipment. Aydlett v. Norfolk-Southern R. Co. (N. C. 1916), 89 S. E. 1000.

One who ships goods on consignment is the party in interest, and may sue for damages for negligent delay in delivery. Phillips v. Seaboard Air Line Ry. Co. (N. C. 1916), 89 S. E. 1057.

A corporation engaged in buying and shipping cotton delivered cotton to a compress company, which issued receipts to the sellers. The receipts were attached to checks on a bank payable to the sellers, and the bank paid the checks and received the receipts as security. The bank surrendered receipts for cotton which the corporation shipped, and received bills of lading, to which drafts drawn on the corporation were attached, and the bank gave the corporation credit therefor. The corporation forged bills of lading, and on faith of their validity a third person honored drafts drawn on him by the corporation. The compress company operated on the block system, so that it was impossible to identify the cotton shipped as the exact bales for which receipts had been issued. Held that, as the bank was always careful to retain sufficient receipts to cover its claims, though allowing the corporation's agent to take the receipts to the compress company and obtain a clearance, or notice to the carrier that a given number of bales were ready for shipment, the bank had as against the carrier the superior right to the cotton, which cannot be defeated because the carrier delivered it to the third person pursuant to the forged bills of lading, for a bank receiving genuine bills of lading is not responsible for the frauds of shippers. New York Cent. & H. R. R. Co. v. Bank of Holly Springs, 236 Fed. 562.

The shipper of goods consigned to himself with draft attached to bill of lading, not having parted with the ownership, may sue the carrier for delivering them to another without payment of the draft. International & Great Northern Ry. Co. v. Kansas City Produce Co. (Texas 1918), 200 S. W. 254.

The owner of material may sue a carrier for delay during transit, although the shipment was made in another's name. Quanah, A. & P. Ry. Co. v. Bone, (Texas 1917), 199 S. W. 332.

6. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

negligent delay in the transportation or delivery of the goods, the person so suffering such injury may bring an action against the carrier to obtain redress for such injury.[7] As a general rule, the consignee is prima facie entitled to bring an action against a carrier for the loss of or injury to goods, or for negligent delay in their transportation or delivery, since it is a presumption of law that on the delivery of goods to a carrier the title thereto vests in the consignee, and when the consignee is the party who has been damaged, with which damage the consignor has no especial concern, the consignee is the proper party plaintiff, especially in an action ex delicto.[8] The common-law rule was that an action for a tort must in general be brought in the name of the person whose legal right has been infringed. Where the consignee has suffiered special damages from the negligent delay in the transportation or delivery of goods by a carrier, he is (in Florida) the proper party plaintiff in an action ex delicto, being "the real party in interest" within the intent and meaning of Section 1365 of the General Statutes of 1906, providing that "any civil action at law may be maintained in the name of the real party in interest."[9] Where the seller is consignor and consignee, and indorses the bill of lading with drafts on the ostensible purchaser, and the real purchaser pays the draft, and the goods are delivered to him, he, as the party beneficially interested, is the proper plaintiff to sue the carrier for injury to goods.[10] At one time it was thought that either the consignor, the consignee or a commission man to whom a shipment was consigned had such an interest in the goods as would enable him to bring suit. While it really cannot be said that the courts are departing from this rule, or that at the present time there is a well defined cleavage or line of authorities on the subject, the courts seem gradually to be working to the theory that an action for loss or damage must at least be brought in the name or for the benefit of the actual owner of the goods at the time the injury occurred, or a subsequent pur-

7. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

8. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

9. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

10 N. C. S. St. L. Ry. Co. v. Abrahamson-Boone Produce Co. (Ala. 1917), 74 So 350.

chaser to whom has been assigned the right of action before suit is brought.[10½] The question arose as to what was the meaning in the Carmack Amendment of the words "lawful holder," in the provision that the carrier should be liable to the "lawful holder"

10½. One who becomes the owner of goods by purchase from the consignee after transportation has ended cannot maintain an action against the carrier for damage to the goods in transit, in the absence of an assignment of such claim for damages from the consignee who was the owner during the transportation. Union P. R. Co. v. Stickel Lumber Co., 99 Neb. 564, 156 N. W. 1082; Meyer v. C. & N. W. Ry. Co. (Neb. 1917), 164 N. W. 1048, 1050.

Where a suit against a common carrier is brought by and in the name of the consignor for the loss or destruction of goods delivered to the carrier for transportation, under an ordinary contract of affreightment, not indicating any reservation of title to such goods in the consignor, it must clearly appear, from the allegations in the petition, that the title thereto was in the consignor at the time the right of action accrued by reason of the loss or destruction of the property. Lowden v. M. & M. Transp. Co. (Ga. 1917), 93 S. E. 45.

In Lowden v M. & M. Transp. Co. (Ga. 1917), 93 S. E. 45, the court said, p. 46: "The consignor, who is the owner of goods lost in transit, may, it is true, maintain an action in tort against the carrier for breach of duty as a common carrier. Savannah, etc., Ry. Co. v. Commercial Guana Co., 103 Ga. 590, 598, 30 S. E. 555; Southern Railway Co. v. Miko, 136 Ga. 272, 71 S. E. 241, 36 L. R. A. (N. S.) 68; Lamb v Mitchell & Co., 15 Ga. App. 759, 764, 84 S. E. 211.

"'However, it is generally found stated in the books that the consignee is prima facie the person entitled to sue for an injury to or the loss of a shipment of goods, and this principle holds true, whether or not in the particular jurisdiction the strict view is entertained that the owner alone can bring an action, since it is a presumption of law that on the delivery of goods to a common carrier the title thereto vests in the consignee, and this presumption the carrier has the right to rely on, in the absence of express notice from the consignor to the contrary. Indeed, where the property is received on an unconditional and unrestricted consignment, the carrier not only may, but must, treat the consignee as the absolute owner until he receives notice to the contrary.' 4 R. C. L. 941. It is further said in the same volume (page 940):

"'That the real owner, whether consignor, consignee, or neither of these, as for instance, a bailor of the consignor, may sue for such a loss or injury, on proof of title is well established.'

"And again (page 942):

"'Proof that the consignor is the owner of goods shipped entitles him to maintain an action against a carrier for their loss.'

"It follows, as a necessary corollary, since a recovery by the consignor is only allowable where proof of title in him is well estab-

of the bill of lading for any loss. On this point, the Supreme Court of the United States said, in Pennsylvania R. R. Co. v. Olivit Bros., 37 Sup. Ct. 468 (p. 471): "The first question involves the Carmack Amendment; and, considering it, the court

lished, that to render a petition good against general demurrer, where the action is brought by a consignor to recover damages on account of the destruction of goods delivered by him to a common carrier (under, so far as appears, an ordinary contract of affreightment reserving no title in the consignor) it should have been distinctly and definitely alleged therein that, at the time the property so delivered to the carrier was actually destroyed, the title thereto was then in the consignor, and not on the consignees or another—the presumption being in such a case that the title was in the consignees."

After the loss or destruction of the property, and therefore after the accrual of the right of action in the person in whom the title to the property was then vested, an assignment or transfer of all of its rights on account of the tort by the consignee to the consignor will not serve to invest the latter with such title to the goods destroyed as would authorize the consignor to maintain an action in tort therefor. Lowden v. M. & M. Transp. Co. (Ga. 1917), 93 S. E. 45.

Wherever a cause of action is assigned without consideration, the assignor continuing to be the real party in interest, the assignee is merely a trustee or collection agent, and the assignor, the real party in interest, is the person in whose favor the cause of action arose within Comp. Laws 1907, § 2931xl, providing that all transitory causes of action arising without the state in favor of residents shall be brought and tried in the county where such resident resides, or, if the latter is a corporation, in the county where such resident resides, or in the county where such corporation has its principal place of business, etc. Dee v. San Pedro, L. A. & S. L. R. Co. (Utah 1917), 167 Pac. 246.

An assignment of a cause of action, with or without consideration, made solely to confer jurisdiction on the court in which the action is commenced, thereby depriving defendant of a privilege afforded by the statutes relating to venue, will not prevail against a proper proceeding to change the place of trial. Dee v. San Pedro, L. A. & S. L. R. Co. (Utah 1917), 167 Pac. 246.

Where plaintiff shipper's contract with consignee called for the delivery of the goods at H., and defendant carrier acknowledged receipt of the goods from plaintiff for transportation naming him as shipper, the contract of carriage was with plaintiff, and he could maintain an action to recover from defendant for goods damaged in shipment without securing an assignment of consignee's rights although the bill of lading designated him as owner. Ithaca Roller Mills v. A. A. R. Co. (Mich. 1917), 163 N. W. 934.

If upon the face of a bill of lading there appears evidence sufficient to put an ordinarily prudent man upon inquiry as to the true ownership of the consignment, a purchaser, with-

of errors and appeals decided that 'any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment * * * upon receiving property for interstate transportation, may maintain an action for any loss, damage, or

out such investigation as would disclose the true owner, from one (other than the consignee) who transfers to him the bill of lading by mere delivery, and who has no title to the property, cannot claim protection as a bona fide purchaser. Richlands Brick Corp. v. Hurst Hdwe. Co. (W. Va. 1917), 92 S. E. 685.

Under Revisal 1908, § 2632, prescribing a penalty for a carrier's failure to transport goods within a reasonable time, where the goods are transported over two railroads under a single contract of carriage, it is proper that both railroads should be made parties to an action for the penalty. Sellars Hosiery Mills v. So. Ry. Co. (N. C. 1917), 93 S. E. 952.

The assignment or transfer of the invoice or bill of sale covering a carload of lumber by the lumber company to a bank, together with delivery of the bill of lading, vested in the bank whatever title the lumber company had to the lumber; the assignment and delivery constituting a symbolical delivery of the lumber. Merchants' & Mnfrs.' v. P. J. Toomer Lbr. Co. (Miss. 1917), 76 So. 565.

Retention of the bill of lading covering lumber sold by a lumber company, and its delivery, together with assignment of the invoice of the lumber, to a bank, in the absence of any testimony as to an absolute sale to the consignee, showed that the lumber company did not intend to part with its title or right of disposition by consignment to the buyer. Merchants' & Mnfrs.' Bank v. P. J. Toomer Lbr. Co. (Miss. 1917), 76 So. 565.

If there was an unconditional sale of a carload of lumber, the title passed to the buyer on delivery of the car at the place of business of the agent of the seller for transportation to the consignee buyer. Merchants' & Mnfrs.' Bank v. P. J. Toomer Lbr. Co. (Miss. 1917), 76 So. 565.

The intention of the seller of goods, as to whether or not he meant title to pass to the buyer on delivery to the carrier for shipment, determines whether title did pass. Merchants' & Mnfrs.' Bank c. P. J. Toomer Lbr. Co. (Miss. 1917), 76 So. 565.

The contention that the owner of the shipment, or someone shown to be duly authorized to act for him in a way that would render any judgment recovered in the action against the carrier res judicata in any other action, is what was meant by the words "lawful holder" in the provisions of the Carmack Amendment of June 29, 1906, § 20, that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, is not so frivolous as not to serve as the basis of a writ of error from

injury to such property caused by any connecting carrier to whom the goods are delivered.' (88 N. J. L. 235, 96 Atl. 588.) Citing Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148. * * * Coming to the merits of the question, however, we concur with the court of errors and appeals in its construction of the Carmack Amendment. It provides: 'That any common carrier * * * receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the *lawful holder* (italics ours) thereof for any loss, damage, or injury to such property caused by it. * * *.' (34 Stat. at L. 595, Chap. 3951, Comp. Stat. 1913, Sec. 8592.) The crucial words are 'lawful holder.' Defendant contends that they mean 'the owner or some one shown to be duly authorized to act for him in a way that would render any judgment recovered in such an action against the carrier res adjudicata in any other action.' And Section 8 of the Interstate Commerce Act is referred to as fortifying such view. It provides that 'such common carrier shall be liable to the person or persons injured' in consequence of any violations of the act. To accept this view would make Section 8 contradict the Carmack Amendment (Section 20), it having only a general purpose, whereas the purpose of the amendment is special and definitely expresses the lawful holder of the bill of lading to be the person to whom the carrier shall be liable "for any loss, damage, or injury" to property caused by it. Adams Exp. Co. v. Croninger, supra." Where a railroad was being operated by receivers at time of injury to stock, a judgment therefor should be rendered against the receivers, and not the railway company.[11] A third person, who, at request of the consignee of goods shipped by seller to buyer by express C. O. D., makes the payment and receives the goods, at least acquires an interest therein to the extent of the payment, free from an agreement, unknown to him, that such payment should be for an old debt.[12]

the Federal Supreme Court to a state court to review a judgment rejecting such contention. Pennsylvania R. R. Co. v. Olivit Bros., 37 Sup. Ct. 468.

11. Slider v. P. M. R. Co. (Mich. 1917), 161 N. W. 961.

12. Frank Adam Co. v. Orpheum Theater Co. (Mo. 1917), 193 S. W. 908.

A railroad company and shipper co-operating in issuing bills of lading falsely describing property shipped are joint tort-feasors.[13] Although judgment may be recovered against either or both joint tort-feasors, collecting the entire judgment against one tort-feasor bars further proceedings against the other.[14] The plaintiff acquired the title to a car of wheat by the payment of a draft with the bill of lading attached, and shortly afterward transferred the same to another bank. Payment of the draft being refused by the purchaser of the grain, the draft and bill of lading were reassigned to the plaintiff. Before that time the wheat had been attached by a third party. Upon the retransfer of the bill of lading to the plaintiff, which in the meantime had gained possession of the wheat, plaintiff sold and transferred it to another party, and under that transfer the wheat was delivered. After the latter transfer, the plaintiff brought an action of replevin against the officer who had levied the attachment upon the wheat. Held, that, the plaintiff having transferred its interest in the wheat before its action was commenced, it was not entitled to recover possession of the wheat.[15] The fact that an

13. Nat. Bank of Savannah v. So. Ry. (S. C. 1917), 91 S. E. 972.

14. Nat. Bank of Savannah v. So. Ry. (S. C. 1917), 91 S. E. 972

15. Okla. State Bk. v. Hicklin (Kan. 1917), 164 Pac. 257.

In Florida East Coast Ry. Co. v. Peterss (Fla. 1916), 73 So. 151, the court said, pp. 161, 162:

"As we have already seen, as a general rule, the consignee is prima facie entitled to bring an action for the loss of or injury to goods or for negligent delay in their delivery, since it is a presumption of law that on the delivery of goods to a common carrier the title vests in the consignee. See the discussion in Griffith v. Ingledew, 6 Serg. & R. (Pa.) 429, 9 Am. Dec. 444; Southern Express Co. v. Armstead, 50 Ala. 350; Madison, Indianapolis & Peru R. Co. v. Whitsel, 11 Ind. 55; Tebbs v. Cleveland, C., C. & St. L. Ry. Co., 20 Ind. App. 192, 50 N E. 486. Of course, it is true that 'one having no property or interest in the goods cannot sue in tort a carrier for his breach of duty' (Edgerton v. Chicago, R. L. & P. R. Co., 240 Ill. 311, 88 N. E. 808); but, as we have already seen, in order to maintain an action against a carrier, either ex contractu or ex delicto, the plaintiff does not have to be the absolute owner of the goods. If the plaintiff has a special interest therein and his legal rights have been invaded, that would entitle him to maintain the action. As was said in Perkins Co. v. American Exp. Co., 199 Mass. 561, 85 N. E. 895, 'the consignee may maintain an action against the carrier for a breach of the duty imposed * * * by law.' That the

chment had been levied on the wheat did not prevent an
:tual transfer of whatever interest the plaintiff had in the

mposes the duty upon a carrier
ansport and deliver to the con-
e goods which have been in-
:d to it within a reasonable time
can be no question. See 4 R. C.
206, on page 737; 1 Michie on
ers, § 904, and authorities there
; Vicksburg & M. R. Co. v.
dale, 46 Miss. 458. As is said in
ore on Carriers (2d Ed.) p. 289:

'he liabilities of a carrier de-
not only on his contract, but
on obligations imposed by law;
in action may be brought either
e contract, or for negligence or
ge to person or property, as the
may be.'

lso, see Central Trust Co. v.
Tennessee, V. & G. Ry. Co.
C.) 70 Fed. 764.

Williamsport Hardwood Lum-
So. v. Baltimore & Ohio R. Co.,
'. Va. 741, 77 S. E. 333, it was

A consignee of lading under a
act of shipment by a common
:r has a beneficial interest
in, entitling him to sue for and,
proper proof, recover damages
)ss or injury thereto, or for un-
nable and negligant delay in
:ry.'

:e 6 Cyc. 510, and authorities
in the notes. We would also
to Parker Buggy Corporation
tlantic Coast Line R. Co, 152
. 119, 67 S. E. 251; Deaver-
Co. v. Southern Railway, 95
485, 79 S. E. 709; Robinson &
in v. Houston & T. C. Ry. Co.,
'ex 185, 146 S W. 537; Missouri
Ry. Co. v. Peru-Van Zandt Im-
:nt Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Ann. Cas. 790. Interesting discussions of this vexed question, with citations of authorities, will also be found in 3 Hutchinson on Carriers (3d Ed.) §§ 1304-1320; 1 Michie on Carriers, §§ 809-811, and § 958; 3 Ency. of Pl. & Pr. pp. 824-834. As is said in section 958 of Michie on Carriers:

"'The carrier has notice of the interest of both the consignor and consignee, and if either suffers an injury through the delay, he should be permitted to obtain redress in his own name in a direct action against the carrier. The consignee is always presumed to possess the necessary ownership until the contrary is shown.'

"It would appear from the allegations in the declaration in the instant case that the consignee is the party who has been damaged by the negligent delay of the carrier in the transportation and delivery of the crates, with which damages the consignor had no especial concern; therefore the consignee is not only the proper party plaintiff in this action, but the 'real party in interest' within the intent and meaning of our statute, section 1365 of the General Statutes, which we have copied above. In International Ocean Telegraph Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810, we held:

"'The person to whom a telegram is sent can maintain an action for whatever legal damage that results to him from the negligence of the company in its transmission or delivery, where the message shows that

grain by the transfer of the bill of lading.[16] A garnishee could not, by its own acts, affect its liability to its creditors without the latter's consent.[17] In the absence of evidence tending to show that a shipper of goods chose to regard the initial carrier as its debtor to the extent only of the price it fixed on the goods when they were shipped, or that it authorized the initial carrier as its agent to collect the price of the goods from the consignee, who obtained possession of the car from the terminal carrier, without surrender of the bill of lading, and disposed of them, the consignee, suing the shipper of the goods, could not uphold its garnishment of the initial carrier as the shipper's debtor, since the consignee could not exercise the right of choosing for the shipper what it would do, or which cause of action it would rely on in reference to the initial carrier.[18] Where a produce buyer sold potatoes at a distant point, took the bill of lading to the bank, indorsed it, and received money on a sight draft, which he used to carry on his business, the proceeds being placed to his credit in his commercial account, from which he checked out the money, the bank, which received the bill and draft in the usual course of business and at once forwarded it to a bank at the destination of the potatoes for collection, was a holder in due course without notice for consideration.[19] Where a railroad, by placing a shipment of corn in a damp, air-tight, refrigerator car, out of which had just been moved ten wagon-

he is interested in it, or that it is for his benefit, or that damage will result to him from such negligence.'

"It seems to us that this principle would apply with like force to a consignee to whom goods had been shipped and who had suffered special damages by reason of the negligent delay of the carrier in the transportation and delivery of the goods instrusted to it for the consignee. It should be kept in mind that this is not an action ex contractu, but an action ex delicto brought by the consignee against the carrier for the recovery of damages which the consignee claims to have sustained by reason of the failure of the carrier to discharge a specified duty and to fulfill an obligation which the law casts upon the carrier."

16. Okla. State Bank v. Hicklin (Kan. 1917), 164 Pac. 257.

17. Peycke Bros. Com. Co. v. Sandstone Co-Op. Co. (Mo. 1917), 191 S. W. 1088.

18. Peycke Bros. Com. Co. v. Sandstone Co-Op. Co. (Mo. 1917), 191 S. W. 1088.

19. First Nat. Bk. v. G. R. & I. Ry. Co. (Mich. 1917), 161 N. W. 859.

loads of rotten bananas, ice, and other refuse, caused the corn to become damp, sticky, and heated, and finally confiscated it and applied the proceeds on its freight and demurrage charges, the amount realized by the road from the saleof the corn belonged to the successors of the shipper.[20] Where a bankrupt joined with his trustee and the purchaser of the bankrupt's claim, against railroads for damage to a shipment of corn in suing the roads, the right of the purchaser to maintain the action was not subject to the objection that the judgment of the bankruptcy court described the property sold him merely as "book accounts," perhaps insufficiently to warrant sale of the claim as part of the bankrupt's assets, since the bankrupt would be bound by the result of the action.[21] Judgment for loss and damage to shipment cannot be rendered against a railroad company, where the evidence shows that railroad was being operated by a receiver at the time the contract of shipment was made as well as at the time of trial, but judgment can be rendered only against the receiver.[22] The purchaser of "book accounts" of a bankrupt shipper can maintain an action against the carrier for loss and damage to a shipment of corn, especially where such bankrupt shipper is a trustee in bankruptcy, and joins with such purchaser in the suit for his benefit.[23]

5. **Pleading.** Questions involving pleading are almost as numerous as are the cases. Generally speaking, the same questions of pleading can be raised in loss and damage cases as in others.[23½] Pleading facts according to their legal effect is suffi-

20. Southern Ry. Co. v. Avey (Ky. 1917), 191 S. W. 460.

21. Southern Ry. Co. v. Avey (Ky. 1917), 191 S. W. 460.

22 Andrews v Roberts (Tex. 1917), 192 S. W. 569.

23. Southern Ry. Co. v. Avey (Ky. 1917), 191 S. W. 460.

23½. Various technical objections are often interposed to the pleadings in the case, and thus some very pretty questions of pleading are often decided in loss and damages cases. A shipper sued a carrier for injury to mules through an unreasonable delay and after the expiration of 91 days filed an amendment petition declaring on the same contract, but alleging the cause of delay and the damages with greater particularity than in the original petition. The bill of lading provided that no suit could be brought after 91 days. Held the amended petition did not state a new cause of action and did not come within the limitation of the bill of

lading. M. K. & T. Ry. Co. of Tex. v. Neale (Tex. 1915), 176 S. W. 85.

A provision in an express receipt that suits on a claim for loss and damage must be brought within one year, may be relied upon by the defendant at the trial although not specifically pleaded as a defense. Rudolph Wurlitzer Co. v. Barrett (N. Y. 1915), 154 N. Y. S. 226.

While foreign statutes must be pleaded, it is unnecessary for a defendant carrier to set up in its answer the provisions of the federal laws where the answer showed that the transaction was interstate, as to which the federal laws govern. Stublefield v. St. Louis & S. F. R. Co. (Mo. 1916), 184 S. W. 149.

A petition for loss and damage did not contain any allegations as to the market value of the stock involved at the point of destination, and the carrier objected to all testimony as to what the market value was at destination, on the ground that there was no allegation to support it. These objections the court overruled. Having alleged generally that the stock was damaged to the extent of $600, plaintiff below proved what the market value would have been if handled with proper care and delivered in due time and what they were worth in the condition in which they did arrive. Held, what is the proper measure of damages is a rule of law, to be applied by the court, as applicable to the facts given in evidence; that it is not essential to the statement of a good cause of action that the petition should set out a proper legal measure of damages; that a statement of the facts essential to a cause of action is all that good pleading requires, and when there is evidence sufficient to take the case to the jury, it is for the court to inform the jury of the measure of damages. Gulf C. & S. F. Ry. Co. v. King (Texas 1915), 174 S. W. 960, 961. A petition for failure to furnish cars for live stock should not in one count sue in tort and in another count declare on contract. Dalton v. St. L., I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 77, 78. A petition states a cause of action sounding in contract under which it is avered that plaintiff entered into a contract for hire with defendant on the 19th day of August, whereby defendant undertook and agreed to furnish two cars at the shipping point for the reception and shipment of his 59 head of cattle on the morning of August 22d, so as to enable him to deliver them at the National Stockyards, East St. Louis, on the morning of August 23d. It was averred, too, that plaintiff, relying upon the contract so entered into, tendered his cattle to be loaded in cars for shipment on the morning of August 22d, and defendant failed and refused to furnish cars to receive them. Because of this plaintiff was prevented from shipping that day, and in the meantime the market for such cattle materially declined, so as to entail a considerable loss upon him, for which damages were prayed. So much of the petition above adverted to as lays both an agreement on the part of defendant and a consideration therefor, avers a breach of the contract. It is clear the case thus stated and the recovery prayed is one sounding in contract and for its breach. And where a petition contains two counts for negligent delay in furnishing cars, one declaring on contract and the other on tort, the court cannot

submit both issues to the jury. Dalton v. St. L., I. M. & S. Ry. Co. (Mo. 1915), 173 S. W. 77, 79.

By direct provision of Code 1907, §5329, a complaint may contain a count ex contractu and one ex delicto, provided the actions arise out of the same transaction or relate to the same subject-matter. Nashville, C. & St. L. Ry. v. Farrell & Braley (Ala. 1906) 70 So. 986.

The claimant in an action against a carrier for a failure to deliver a shipment may either sue in tort as for a breach of the carrier's common law duty to deliver, or for the breach of the contract of transportation. J. A. Lamy Mfg. Co. v. Missouri Pac. Co. (Mo. 1916), 182 S. W. 131.

Where a petition alleged that corn was good, dry, and merchantable, and that appellants were negligent in "allowing or permitting contents, or parts of contents, of said cars to be rained upon or otherwise dampened in transit," an answer that the corn "was shelled while too green, and that same was reshipped in a green, damp, and unripe condition," was nothing more than a denial that the corn was rained upon and was ripe, merchantable grain. St. L. B. & M. Ry. Co. v. Evans (Tex. 1915), 173 S. W. 228.

Where a shipper sues a carrier for damages to live stock, if the carrier denies transportation and delivery to it of the particular shipment, it cannot afterwards on the trial put in evidence tariffs and classifications limiting liability which it has filed with the Interstate Commerce Commission. Reading v. C. B. & Q. R. Co. (Mo. 1915), 173 S. W. 451, 452.

In an action against a common carrier of live stock for damages to a shipment, where, nearly three years after the shipment, and in a second trial, defendant tendered the plea that notice of the loss was not presented within the time required by the contract of shipment, the disallowance of such amendment by the court was proper, defendant having waived the provision of the contract of shipment in view of the lapse of time, the preceding trial, and cost to claimant; the fact that the carrier had been kept from filing such plea before because the United States Supreme Court had not decided that the Carmack Amendment to the Interstate Commerce Act superseded state laws governing a carrier's liability for damage to interstate shipments, affording no reason for inflicting a hardship upon claimant. Cincinnati, N. O. & T. P. Ry. Co. v. Smith & Johnston (Ky. 1915), 176 S. W. 1013.

Where a shipper of peanuts contended they were damaged because the car furnished could not be ventilated, allegations, in answer that the shipper was negligent in loading green peanuts into an unventilated car, do not admit that the car was not suitable. Cleburne Peanut & P. Co. v. Missouri K. & T. Ry. Co. of Texas (Tex. 1916), 184 S. W. 1170.

Where a complaint for damages to part of a shipment is sufficiently clear and specific to inform the carriers of the charges of negligence which they are required to meet and to state at law a good cause of action for a breach of common-law duty of the carrier, the refusal of a motion to make a complaint more specific is so far within the discretion of the trial court that a

cient.[24] A petition in an action for damages for the destruction of goods during transportation, setting out the shipping contract in haec verba, but failing to plead its legal effect, was demur-

cause will not be reversed on that ground unless the rights of the complaining party have suffered. Adams Express Co. v. Welborn (Ind. 1915), 108 N. E. 163. Foreign freight cars used by a resident railroad under an agreement to avoid transfer and whereby it uses such freight cars for its own shipments upon the basis of a fixed rental are not subject to attachment by a resident creditor of the foreign carrier, which owns such equipment. Koontz v. Baltimore & O. R. Co. (Mass. 1915), 107 N. W. 973. Since a trial court has large discretion it may permit by amendment a defense where a suit for damage to freight was not brought in apt time. Kansas City Southern Ry. Co. v. Bull (Ark. 1915), 179 S. W. 172, 174.

Under the Interstate Commerce Act, the liability of a carrier cannot be enlarged by the form of action. Ely v. Barrett, 168 N. Y. S. 419.

Ordinarily, a defendant seeking exceptions from liability under a statutory proviso has the burden of pleading and proving such exception. Quanah, A. & P. Ry. Co. v. Bone (Tex. 1917), 199 S. W. 332.

It is sufficient to plead the facts relied on to show estoppel. South Texas Lumber Co. v. Wolvin Line (Tex. 1918), 199 S. W. 1129.

24. Dobbins v. Delaware, L. & W. R. Co., 163 N. Y. S. 849.

A plea that loss of crude oil shipped by plaintiff was due to plaintiff's negligence in not closing a valve, *held* demurrable because not negativing carrier's negligence. Atlantic Coast Line Ry. v. Enterprise Cotton Oil Co. (Ala. 1917), 74 So. 232.

An additional allegation that the shipper was insolvent, and that that fact would have been descovered long prior to the issuance of bills of lading which caused plaintiff's loss, does not show liability on the part of the carrier. National Park Bank of N. Y. v. Louisville & N. R. Co. (Ala. 1917), 74 So. 69.

In an action on the case, since the adoption by this court of rules 71 and 72 of the rules of circuit court in common-law actions, the defendant has the right to file the plea of not guilty together with special pleas in the nature of confession and avoidance, and, if he would avail himself of the benefit of certain matters of defense, he must file such special pleas. Florida East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

A party to a transaction prohibited and penalized by law cannot estop himself from setting up its invalidity. Central of Ga. Co. v. Blount, 238 Fed. 292.

Where the petition was filed and citation issued some time before the action was barred, but the citation was not sent by plaintiff's attorneys to the sheriff for service for nearly two months, at which time the right of action was barred, the plaintiff must show a bona fide intention to have the process served in time, and a reasonable excuse for not having done so. Panhandle & S. F. Ry. Co. v. Hubbard (Tex. 1916), 190 S. W. 793.

able.[25] Questions of pleading in loss and damage cases generally apply to the particular facts involved, pleadings in such cases being subject to the ordinary rules of pleading. A party asking affirmative relief must lay a predicate for the relief sought in the pleadings, and, to entitle him to such relief, the proof must sustain the allegations.[26] On general demurrer, the allegations of the petition must be regarded as true.[27] A general allegation of negligence in a petition is sufficient in the absence of a special exception.[28] The petition for injury to a live stock shipment, alleging that defendants were negligent and careless and were guilty of delays caused by said negligence, and on account of their negligence two of the animals were cut, bruised, and injured, and the others were greatly damaged, gaunted, and impaired in their market value, is not limited to a claim for negligent delay.[29] In an action against a carrier for damages on an interstate shipment of hogs, where plaintiff declared upon a contract of shipment, without saying whether it was written or created by delivery and acceptance, and defendant set up a written contract, plaintiff's reply denying the validity of the written contract alleged by defendant, did not make any change in his cause of action.[30] In an action against a carrier for damages to an interstate shipment of hogs, a variance between the original petition and an amended petition was waived by answering over.[31] In an action against a carrier for damages on an interstate shipment of hogs that the original petition declared on a written contract of shipment, and an amendment to the petition was on an implied contract, was immaterial, being a mere matter of procedure governed by the state practice.[32] In an action for damages to a shipment of live stock under a

25. Wilson v. C. G. W. R. Co. (Mo. 1916), 190 S. W. 22.

26. Texas Glass & Paint Co. v. Darnell Lumber Corp. (Tex. 1916), 185 S. W. 965.

27. W. B. Clarkson & Co. v. Gans S. S. Line (Tex. 1916), 187 S. W. 106.

28. St. Louis, B. & M. Ry. Co. v. Marcofich (Tex. 1916), 185 S. W. 51.

29. St. Louis, B. & M. Co. v. Marcofich (Tex. 1916), 185 S. W. 51.

30. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

31. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

32. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

contract whereby the shipper was to care for, feed, and water the stock in the yards or pens, and to unload and reload them for any purpose at his expense, and to hold the carrier harmless against damage while in his charge, except that resulting from the carrier's negligence, where the shipper alleged that the cattle were confined in the cars and pens for more than forty-nine hours without food, water, or rest, and the carrier's failure in its duty, and where the answers specifically pleaded the contract that the shipper accompanied the shipment, but did not expressly aver that he failed in his duty or that the damages resulted from his negligence, though asserting, "that plaintiff should be held estopped from setting up and recovering herein on his alleged cause of action," there was a sufficient allegation of contributory negligence to enable the shipper to meet it.[33] An exception to the petition as seeking to enforce a contract illegal as violative of the United States laws relating to rates on interstate commerce need not name the particular laws.[34] Objection that the suit is based on an illegal contract when the petition discloses it, may be made at any stage, as it goes to the substance of the petition.[35] A misjoinder of actions and of parties plaintiff is not a ground for quashing the service of a summons, but such an error in the proceedings must be corrected by a motion to require an election of which cause of action will be prosecuted and which party will prosecute it.[36] At common law, in an action against a carrier for loss or damages to goods shipped, the carrier need not allege or prove the carrier's negligence.[37] The ultimate issue of negligence, in an action against a carrier for delay in transportation, was properly and sufficiently submitted by a special issue, whether the delay, if any, or any part of it, and if any, what part could have been avoided by the exercise of ordinary care, rather than by special issues on evidentiary and inconclusive facts, as whether the accident to the

33. Ft. Worth & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

34. St. L., I. M. & S. Ry. Co. v. Landa & Storey (Tex. 1916), 187 S. W. 358.

35. St. L., I. M. & S. Ry. Co. v. Landa & Storey (Tex. 1916), 187 S. W. 358.

36. L. & N. R. Co. v. Greenbrier Distillery Co. (Ky. 1916), 187 S. W. 296.

37. Cudahy Packing Co. v. A. T. & S. F. Ry. Co. (Mo. 1916), 187 S. W. 149.

train was unavoidable; this not necessarily including the idea of an unavoidable delay resulting therefrom.[38] A complaint alleging that a carrier received goods, that they were damaged in transportation by its negligence, and that plaintiff was damaged in the sum of $3,000 by its failure to transport and deliver them, alleged a cause of action for damages.[39] In an action against a carrier for damages to a shipment of hogs alleged to have been caused by overheating a carrier's pen before loading, a clerical error in the complaint alleging that the hoge were delivered at the place of shipment on the 19th of the month did not estop the plaintiffs to show delivery on the 18th.[40] Under the Carmack Amendment, requiring that a contract for a shipment in interstate commerce should be in writing but not stating that if the contract is not in writing it shall be void, a plaintiff in an action for damages to an interstate shipment is not compelled to plead a written contract of shipment.[41] Rev. St. 1909, Sec. 1830, providing that no further pleading of facts after the reply is necessary to put a case at issue, does not obviate the necessity of special demurrer, attacking a plaintiff's cause of action if changed by reply.[42] In an action against a carrier for damages to an interstate shipment of hogs, if carrier wished to rely upon any defensive terms in the written contract not pleaded by the shipper, it could set up the written contract to obtain the benefit of its provisions.[43] Conclusions of law in the petition at variance with the averments of fact cannot be relied on to state a cause of action.[44] The duties and responsibilities of a common carrier of live stock may be modified by contract between the carrier and shipper of the stock, and where the carrier relies upon such a contract to relieve it of its common-law liability in an action against it for damages resulting from its

38. K. C., M. & O. Ry. Co. of Texas v. Odom (Tex. 1916), 185 S. W. 626.

39. Whittington v. Southern Ry. (N. C. 1916), 90 S. E. 505.

40. McSpadden v. Lusk (Mo. 1916), 186 S. W. 731.

41. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

42. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

43. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

44. United States v. Chicago M. & St. P. Ry. Co., 234 Fed. 386.

failure to transport the stock safely, it must plead and prove such contract.[45] A demurrer to evidence admits the truth of all the testimony and all reasonable deductions that can be made therefrom, and it should set forth all the evidence intended to be admitted thereby; the object of such a demurrer being to refer to the court the law arising from admitted facts.[46] In an action against a carrier for injuries to a shipment of live stock, the carrier cannot rely on the shipper's failure to file a written claim for damages within five days for the removal of the stock from the car as provided by the bill of lading, in the absence of pleading of such defense.[47] In an acttion by the buyer and consignee of plate glass to recover the amount paid for a piece of the glass broken in transit, where the pleadings alleged the sale of the glass to be delivered at its place of business for a stipulated sum, which allegations were not denied, and where the agreed statement of facts showed a purchase as alleged, and that, when the box was opened, one of the pieces of glass was broken and worthless and was refused, and that upon notification by the buyer the seller shipped another piece of glass at an invoice price, which the buyer paid, the buyer, whose action was predicated upon the seller's contract for safe delivery, would be entitled to recover the contract price, without reference to the seller's negligence in packing the glass for shipment.[48] The petition of plaintiff, who sued for the loss of tin shipped over defendant's line, charged that, while the car containing the tin was in the custody of the defendant as a common carrier, a portion of the shipment was stolen by agents and employees of defendant while employed in connection with its transportation, and that such theft was committed by such agents and employees either alone or in conspiracy with other persons unknown to plaintiff. Held, that the petition charged a theft of goods in transit by employees of the carrier acting, not in the carrier's

45. Walton Land & Timber Co. v. L. & N. R. Co. (Fla. 1916), 72 So. R. 485.

46. Walton Land & Timber Co. v. L. & N. R. Co. (Fla. 1916), 72 So. R. 485.

47. Tobin v. Lake Shore & M. S. Ry. Co. (Mich. 1916), 159 N. W. 389.

48. Texas Glass & Paint Co. v. Darnell Lumber Corp. (Tex. 1916), 185 S. W. 965.

interest, but in their own, and against its interest.[49] In an action for loss of freight, where defendant's agent attached to the bill of lading a notation of the shortage, the failure of defendant, which pleaded the general issue, to file an affidavit denying the execution of the notation, did not under Circuit Court Rule 33, providing that upon plea of the general issue in an action upon any written agreement under seal or without seal, the plaintiff shall not be put to the proof of the execution of the instrument, or the handwriting of the defendant, unless defendant or some one in this behalf shall file and serve a copy of an affidavit denying the same, and that such rule shall apply to indorsers as well as other parties, preclude defendant from denying or explaining the execution of the notation or of questioning the authority of the agent making it; for the notation on the bill of lading was a mere admission, and was not an instrument on which suit could be maintained.[50] In an action for loss of freight in shipment, the defense that the goods shipped were delivered by the carrier is not an affirmative one within the meaning of Circuit Court Rule 23, but may be shown under the general issue.[51] Every plea must be simple, entire, connected, and confined to a single point. A plea which contains more than one independent fact, or set of facts, either of which alone is a sufficient answer to the declaration, is bad for duplicity, whether the defense is in bar, or in abatement, or in both.[52] All matters in confession and avoidance must be pleaded specially, the plea must confess the facts pleaded, and the plea must avoid, and the avoidance must be pleaded coextensive with the confession, and must be an answer to the whole of what is adversely alleged.[53] A plea in justification or excuse admits the facts alleged by the plaintiff, but in effect denies that the plaintiff had at any time a good cause of action, either because the conduct of the defendant is justified in law, or because he is excused from liability in the particular case through some act or conduct

49. Moore v. Duncan, 237 Fed. 780.

50. Oceana Canning Co. v. King (Mich. 1917), 161 N. W. 895.

51. Oceana Canning Co. v. King (Mich. 1917), 161 N. W. 895.

52. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 74 So. 151.

53. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

of the plaintiff.[54] Where a plea in the nature of confession and avoidance interposed to an entire declaration, consisting of a number of counts, is found to answer only some of such counts, it is demurrable.[55] A plea in bar of the plaintiff's action must be certain to a common intent; it must be direct and positive in the facts set forth, and must state them with necessary certainty; and a plea which professes to be the entire declaration, but omits to answer a material part thereof, is bad on demurrer.[56] Any pleading, wheher a law or in equity, is to be most strictly construed against the pleader thereof, and this principle applies with especial force to a plea which is in the nature of a confession and avoidance, and, where such a plea has on the face of it two intendments, it must be construed most strongly against the party who pleads it.[57] To maintain an action for fraudulent concealment, there must be shown a duty to disclose the truth, and that the disclosure was not made when opportunity was presented whereby the party to whom the duty was due was induced to act to his injury.[58] An amendment of the complaint, containing counts for conversion and money had and received by adding common counts and counts for failure to deliver a shipment, is permissible under the Alabama Code, and does not constitute a departure, the subject of controversy being the same as in the original.[59] An action against a carrier for negligently issuing a bill of lading misdescribing the property is based upon tort, and not contract.[60] A petition which states two separate causes of action which were misjoined, may be corrected by exception or plea in abatement subject to the discretion of the court or by dismissal as to one of the causes of action.[61] Where

54. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

55. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

56. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

57. Fla. East Coast Ry. Co. v. Peters (Fla. 1916), 73 So. 151.

58. National Park Bank of N. Y. v. Louisville & N. R. Co. (Ala. 1917), 74 So. 69.

59. N. C. & St. L. Ry. Co. v. Abrahamson-Boone Produce Co. (Ala. 1917), 74 So. 350.

60. National Bank of Savannah v. Southern Ry. (S. C. 1917), 91 S. E. 972.

61. International & G. N. Ry. Co. v. Reed (Tex. 1916), 189 S. W. 997.

a citation was not sent for service until two months after it was issued, and after the right of action was barred by limitations, plaintiff's intention to have it served, and the reasonableness of his excuse, present questions for the jury.[62] In an action for negligence and delay in shipping cattle, an amendment to the petition offered during the trial, alleging that the cattle were on the cars for forty-three hours and plaintiffs were refused permission to unload, feed, and water them during that time, etc., did not set up a new cause of action, although alleging different and additional grounds of negligence, and was not barred, though two years had elapsed.[63] But such an amendment required continuance, upon defendants' request, to afford reasonable time to procure evidence to rebut the new allegations, since the amendment set up entirely new ground of negligence, notwithstanding plaintiffs, in repelling any inference of contributory negligence arising from their having special charge of the cattle during transportation, had introduced some evidence that they had requested the cattle be unloaded for feed, water, and rest.[64] A petition against connecting carriers for damage resulting from delay in transportation, which alleged that the shipper, at the request of the consignee, informed the carrier of the damage which would result from delay in transportation, that the shipper agreed, in consideration of the carrier establishing a lower through rate, to ship all the materials needed over that line, that thereafter the shipper, acting for the consignee, delivered to the carrier such material for transportation, and that shipments were delayed for an unreasonable length of time, declares upon a breach of the original oral contract for shipment, and not upon the bills of lading subsequently issued.[65] A petition not having been excepted to, every reasonable intendment must be given it in favor of its sufficiency.[66]

62. Panhandle & S. F. Ry. Co. v. Hubbard (Tex. 1916), 190 S. W. 293.

63. K. C., M. & O. Ry. Co. of Tex. v. James (Tex. 1916), 190 S. W. 1136.

64. K. C., M. & O. Ry. Co. of Texas v. James (Tex. 1916), 190 S. W. 1136.

65. Gulf, C. & S. F. Ry. Co. v. Nelson (Tex. 1917), 192 S. W. 1056.

66. H. & T. C. Ry. Co. v. Roberts (Tex. 1917), 194 S. W. 218.

—**Counterclaims.** An interesting question of pleading peculiar to loss and damage cases is presented in the problem as to the right of a shipper to file a counterclaim for damages to a shipment when sued for the freight charges. It has sometimes happened that when goods have been delivered in a damaged condition, the shipper, if he has obtained possession of them without payment of the freight charges, because he was on the carrier's credit list, or for some other reason, refuses to pay the charges when asked to do so, but seeks to set off his damage when sued. For instance, in a recent case in Indiana a shipper was sued for $328.13 freight charges, and obtained a verdict for $1,066.80 on a counterclaim for injuries to the shipment.[67] The United States courts, however, have had occasion recently to pass upon this question in two cases, and these District Courts have held that a claim for loss and damage, growing out of a freight shipment, does not constitute a lawful setoff against a claim of an interstate carrier for unpaid freight charges. These federal decisions hold that it is against public policy to permit a counterclaim of this kind to be filed. The theory of such federal decisions is that it opens the door for fictitious claims. The idea seems to be that since one of the devices used in the obtaining of rebates is the making of fictitious claims for damages, to permit

67. N. C. & St. L. Ry. v. Johnson (Ind. 1915), 109 N. E. 912.

As a matter of general law, in an action of a common carrier for charges, the shipper may set off damages to or loss of goods sustained by the negligence of the carrier.

Schwinger v. Raymond, 83 N. Y. 192.

Dunham v. Bower, 77 N. Y. 76.

Manning v. Watson, Cheves (S. C.), 60.

S. & N. Ala. R. R. Co. v. Henlein & Barr, 56 Ala. 368.

Bearse v. Ropes, Fed. Case 1192.

Leech v. Baldwin, 5 Watt's, 446.

Snow v. Carruth, Fed. Case 13144.

Relyea v. New Haven Rolling Mill Co., 42 Conn. 579.

Edwards v. Todd, 2 Ill. 463.

Bancroft v. Peters, 4 Mich. 619.

Mallory v. Burrett, 1 E. D. Smith, N. Y. 234.

Rhodes v. Newball, 126 N. Y. 574.

But see Merrick v. Gordon, 20 N. Y. 93.

Byrn v. Weeks, 4 Abb. Ct. of App. Dec. 657.

Star Bird v. Barrons, 43 N. Y. 200.

Elwell v. Skiddy, 8 Hun. 72; 77 N. Y. 282.

Battle v. Atkinson (Ga. 1911), 71 S. E. 775.

counterclaims in actions of freight charges would simply open the door to a renewal of this method of rebating, and at least would cast a suspicion upon the transaction if a compromise is effected. As one of the courts expressed it "So important is it that the collection of freight charges should be uniform as to all shippers, so important is it that it be above suspicion of favoritism, that I feel that it is against public policy to permit a counterclaim of this kind to be pleaded * * *."[68] The soundness of

68. I. C. R. R. v. Hoopes & Sons, 233 Fed. 135; C. & N. W. Ry. v. Stein, 233 Fed. —; also see I. C. C. Conference Ruling 48.

In another case the court held that a plea of recoupment for damages to a shipment to defeat a railroad company's claim for charges is contrary to the Act of Congress, requiring freight to be paid only in cash. Johnson-Brown Co. v. Delaware, L. & W. S. Co., 239 Fed. 590.

Estoppel is not available as defense to action for balance of freight for interstate shipment where, through mistake in computation, the full lawful rate, which could not be varied, was not collected, though the consignor, who also was consignee, will suffer loss through insolvency, arising since the original payment, of the person to whom the goods while in transit were sold, with indorsement and delivery of the bill of lading. Bush v. Keystone Driller Co. (Mo. 1917), 199 S. W. 597.

In Bush v. Keystone Driller Co. (Mo. 1917), 199 S. W. 597, the court said, p. 599:

"The shipper cannot plead a counterclaim for damages to the goods shipped, no matter how meritorious his claim may be. I. C. R. R. Co. v. Hoopes et al. (D. C.) 233 Fed. 135, was an action for unpaid freight charges on an interstate shipment. Defendants filed a counterclaim for damages to the goods shipped. A demurrer to this counterclaim was sustained, and the court in deciding the case quoted from C. & N. W. Ry. Co. v. Stein Co. (D. C.) 233 Fed. 716, thus:

"'If a shipper may be permitted to set off, in an action for freight earned by the carrier, claims for damages which the shipper alleges that he has sustained, the court must prevent the usual right to make compromises of such suits, and must undertake the impossible task of holding the carrier to diligence and good faith, in preparing and presenting its defenses, in order to prevent the granting and receiving of rebates by insidious agreement between the parties with reference to the disposition of the suit. The public policy evinced by the acts of Congress relating to interstate commerce requires the denial of the right to set-off in such cases, leaving the shippers an independent action to enforce any rights that belong to them.'

"If the plaintiff and the defendant could not contract for a different rate than that prescribed by the schedule on file with the Interstate Commerce Commission and defendant could not plead a just

these federal decisions, however, may well be doubted. The federal courts of the different states conform their practice as near as may be to the practice in the state courts in which their respective districts are located. If, under the state practice, a counterclaim of this kind is permissible, there is no reason why a federal court should presume a carrier and shipper intend to evade the law by fictitious suits. If the shipper has a valid claim it is certainly easier to adjudicate it in a suit growing out of freight charges on the same shipment than to have two separate suits brought. Of course, as a matter of good practice, as well as law, there is no reason why a shipper should be permitted to counterclaim damages for loss or injury to a different shipment than that for which he is sued for charges, but where it is all one transaction, it can hardly be said to be against public policy to allow a counterclaim to be filed. Certainly it is difficult to believe that the shipper and carrier who seek to evade the law by paying fictitious claims will do so in open court in the shape of the compromise of a lawsuit, when there is very much less risk attached to paying a fictitious claim direct without the publicity attending court action. A very recent case moreover has approved this reasoning.[69]

counterclaim for damages to the goods shipped, then can the plaintiff accomplish by its silence, or its act or failure to act, that which it could not do by contract."

69. The best considered case on the subject has recently been rendered in the District Court of New York by Judge Julius Mayer. Inasmuch as his reasoning supports the rule above laid down and seems very clear, we quote it somewhat extensively. He said in the case of Wells Fargo & Co. v. Cuneo, 241 Fed. 727, p. 729:

"The demurrer to the counterclaim is interposed on the ground that, in an action by an interstate carrier to recover its charges, a defendant cannot counterclaim for damages to the shipment, because the Interstate Commerce Act requires the carrier to collect its lawful charges and to accept only money in payment. The act to regulate commerce, approved February 4, 1887, as amended, provides (section 6) as follows: 'No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service connected

6. Burden of Proof. The question of what proof the claimant must make is one of extreme importance. Since the facts of how the injury occurred, are generally within the exclusive knowledge of the carrier, the courts are liberal in permitting the claimant, by showing certain essential facts within his knowledge to raise presumptions which complete his case. Thus, if he shows property is delivered to the carrier in good condition, and arrives at destination in damaged condition, a prima facie case

therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, that wherever the word "carrier" occurs in this act it shall be held to mean "common carrier.' See Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265. 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Chi., Ind. & L. Ry. Co. v. United States, 219 U. S. 486, 31 Sup. Ct. 272, 55 L. Ed. 305. In support of the demurrer, plaintiff cites Illinois Central R. Co. v. W. L. Hoopes & Sons et al (D. C.) 233 Fed. 135, and Chicago & N. W. Ry. Co. v. Stein Co. (D. C.) 233 Fed. 716. I regret that I am unable to follow these cases, and it may be pointed out in passing that I. C. C. Conference Ruling No. 48, referred to in the Hoopes Case, supra, has been withdrawn since that decision. That defendant would have the right to begin an independent action to recover for damages to the shipment cannot be denied. It may well be that the parties cannot compromise out of court, but I need not pass on that question. It must be assumed that, when litigants come into a court, they are submitting a real controversy for determination, not by themselves, but by and before a tribunal created and organized for that purpose It cannot be presumed that the parties will decieve the court, and thus subject themselves to serious consequences, nor that they will compromise the litigation as a mere device to evade the Interstate Commerce Act, and thereby subject themselves to its penalties. The provisions of the act in question were never intended to deprive a shipper or consignee of his lawful remedies against the carrier for such breaches or wrongful acts as the carrier may have committed. The policy of the law is to settle germane disputes in one litigation, and this counterclaim fully accords with the New York practice in that regard. When the carrier has found a defendant in one jurisdiction and has brought its action there, it would be most unjust to force such a defendant to go to another jurisdiction to assert his rights and claims in an independent action; and if, on the other hand, both parties are in the same jurisdiction, it would be the height of absurdity to require two actions to be brought where the con-

troversy could be disposed of in one. Obviously, if the parties intended to evade the statute by an unlawful compromise, they could do it as easily they could in one. So that really what the contention comes down to is that the shipper would be deprived of his rights; for, if the right to counterclaim for damages is denied him, by the medium of two lawsuits as I cannot appreciate any theory on which he could be permitted to assert precisely the same claim for damages in an independent lawsuit. Indeed, such a construction as plaintiff here urges would give to carriers, under some circumstances, an undue advantage, and might readily work an injustice upon shippers and consignees never contemplated by the statute. The demurrer to the counterclaim is overruled."

Since Judge Mayer's opinion, one of the state courts ruled that it is permissible to file such a counterclaim. This decision does not refer to the opinion of Judge Mayer and was evidently written about the same time, though not published until a little later.

In P. R. Co. v. Bellinger, 166 N. Y. S. 652, the court said, p. 653:

"There is one theory underlying all the demurrers and the various grounds stated, viz., that inasmuch as freight charges cannot be paid, except in currency, and no other or different payment from that established by the freight tariffs or schedules is permissible, it would consequently defeat the purpose of the Interstate Commerce Act to allow a claim for damages by way of counterclaim to reduce the amount demanded for the freight charges. This contention is supported by three decisions in the District Court of the United States, viz.: Chicago & N. W. Ry. Co. v. Stein Co. (D. C.) 233 Fed. 716; Illinois Central R. R. Co. v. Hoopes & Sons (D. C.) 233 Fed. 135; Johnson-Brown Co. v. D., L. & W. R. R. Co. (D. C.) 239 Fed. 590. The theory is enunciated in this language in the Stein Case:

"'Under the acts of Congress relating to the transportation of interstate commerce, as construed by the Supreme Court of the United States in Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467 [31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671] and in Chicago, Indianapolis & Louisville Railway Co. v. United States, 219 U. S. 486 [31 Sup. Ct. 272, 55 L. Ed. 305], the carriers cannot accept in payment for the transportation of interstate commerce anything but cash, and no contract, however fair, looking to the payment for such services by an exchange of commodities, can stand. If a shipper may be permitted to set off, in an action for freight earned by the carrier, claims for damages which the shipper alleges that he has sustained, the court must prevent the usual right to make compromises of such suits, and must undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defenses, in order to prevent the granting and receiving of rebates by insidious agreement between the parties with reference to the disposition of the suit.'

"In this state such a counterclaim was undoubtedly allowable before the enactment of the Interstate Commerce Act. A claim for damages to goods grows out of the same transaction as the freight claim in respect to the carriage of the same goods. Schwinger v. Raymond, 83 N. Y. 192,

of negligence of the carrier is made out.[70] A shipper showing a delivery of goods to a carrier, and that they were not redelivered makes out a prima facie case against the carrier entitling him to damage for loss, and to avoid such damages the burden

38 Am. Rep. 415. There is no provision in our Code which restricts the right to plead such a cause of action as a counterclaim, because of the theoretical objection set forth in the above-mentioned federal cases. The practice of this court in relation to the allowance of a counterclaim must be governed by the Code of Civil Procedure, and under that Code the counterclaims here in question are allowable. Section 501.

"In order to prevent a possible discrimination or rebating, it may be incumbent upon the courts to see to it that the action is properly prosecuted to judgment; but it seems unnecessary to require two actions to be maintained and a payment of money to pass to and fro to accomplish what with care can as well be accomplished in the single action. The question here involved has arisen also in the state courts of Georgia, and it has been there held that a similar counterclaim was allowable under the Georgia practice. Battle v. Atkinson, 9 Ga. App. 488, 71 S. E. 775, and 11 Ga. App. 837, 76 S. E. 597. The Georgia court, in the former of the two opinions, said:

" 'The very object of allowing pleas of recoupment and set-off and of similar pleas is to prevent a multiplicity of suits, and to enable the court, when it has all the necessary parties before it, to adjudge all their respective rights, and to render judgment which will finally end the controversies pending between them. Now, if the shipper had sued * * * in a separate action, and had recovered judgment for, say, $1,200, which he alleged to be the damage done to the shipment, and the carrier had paid over twelve $100 bills, there would certainly be nothing in the spirit or the letter of the act of Congress to prevent the shipper from taking four of those bills and paying to the carrier its claim for freight charges. The effect of the plea in the present case is simply a prayer on the defendant's part that he be allowed to consumnate this same end through the offices of the court which the plaintiff has first invoked.' "

We still cannot see any reason to relinquish our previous theory, (especially since it has subsequently been arrived at by able judges), to the effect that such a counterclaim is perfectly permissible Also see P. R. R. v. Bellinger, 166 N. Y. S. 652.

70. Presley Fruit Co. v. St. Louis, I. M. & S. Ry. Co. (Minn. 1915), 153 N. W. 115. Also see Nat'l El. Co. v. G. R. R. R. (Minn 1917), 163 N. W. 164.

Under the Carmack Amendment in an action against initial carrier for loss of poultry occurring on a connecting line, the burden of proof is not on the shipper to show that loss was "caused by" the connecting line, and not the military authorities in a flood district under martial law, which confiscated the poultry for benefit of sufferers. Chicago & E. I. R. Co. v. Collins Produce Co., 39 Sup. Ct. 189.

The receipt of goods in a damaged condition raises a presumption that the carrier was negligent. St. Louis I. M. & S. R. Co. v. Hudgins Produce Co. (Ark. 1915), 177 S. W. 400; C. R. I. & G. Ry. v. Scott (Tex. 1912), 156 S. W. 294, 297.

A cast iron heating boiler shipped from St. Paul to Waseca by train, transferred from the train by dray and lowered into a basement, and there installed, was found, after installation, to be cracked. The evidence was that it was sound when shipped, and that it was carefully handled after it was taken from the train, and received no jars or jolts, but there was evidence that such boilers crack very easily, and there was no positive evidence that it was not cracked while so handled. The evidence was not conclusive that the damage occurred while on the train, and it was held the rule that, when goods are delivered to a carrier in good condition and arrive at destination in damaged condition, a prima facie case of liability is made out, did not, as a matter of law, apply. Lewer v. Minneapolis & St. L. R. Co. (Minn. 1916), 156 N. W. 6.

While, where perishable goods are received by a carrier in good condition for delivery at a point in the ordinary course of business they could be delivered in good condition, failure to make such delivery imposes the duty upon the carrier to show affirmatively that it was free from negligence in the transportation, this obligation does not arise until the plaintiff has shown the necessary conditions. Orunsten v. N. Y. C. R. Co., 165 N. Y. Supp. 990.

In an action for damages to a shipment, it is the claimant's duty to establish that the goods were in good order when delivered to the carrier. Michellod v. Ore.-Wash. R. & Nav. Co. (Ore. 1917) 168 Pac. 620.

A shipper, suing for the value of goods lost in transit, has the burden of showing who had custody of the goods at the time when a portion thereof was stolen. Wallens v. New York Cent. & H. R. R. Co., 166 N. Y. S. 1083.

A presumption, not being the best evidence, and possibly untrue as matter of fact, is but a substitute for lack of anything better, and should not be indulged when evidence of the matter presumed is at hand. Cudahy Packing Co. v. C. & N. W. Ry. Co. (Mo. 1917), 196 S. W. 406.

While the carrier may waive a provision of a bill of lading requiring its surrender before delivery of the property, the presumption that it did so cannot be indulged. C. R. I. & P. Ry. Co. v. McElhaney (Ia. 1917), 165 N. W. 67.

It might here be stated that the fact that goods are delivered in an injured condition does not raise the presumption that the carrier has been negligent, in the absence of evidence showing the condition of the goods when delivered to the carrier. In other words it is essential in all cases for the claimant to prove that the shipment was in good condition when delivered to the carrier, if he wants to raise a presumption that the carrier was negligent, by showing that the goods were damaged when delivered. The mere fact that the goods are delivered in a damaged condition does not show the carrier to have been negligent, unless it is also made clearly to appear that the shipment was in good condition when first delivered to the carrier. Galveston, H. & S. A. Ry Co. v. John

is upon the carrier to prove its freedom from liability.[71] Where a shipper shows a delivery of goods to a carrier as warehouse-

Muennink & Son (Tex. 1917), 195 S. W. 613.

The burden is on the plaintiff to establish the issues on which he relies for recovery, and on the defendant to establish the affirmative defenses relied on to defeat recovery. Quanah, A. & P. Ry. Co. v. Novit (Tex. 1918), 199 S. W. 496.

The rule that the shipper cannot recover for injuries to stock unless he shows affirmatively that the stock was in good order when received by the carrier does not apply where a shipper of live stock alleged specific negligence by exposure of stock in storm. McNamara v. Chicago, R. I. & P. Ry. Co. (Iowa 1918), 165 N. W. 1008.

In an action for damage to apples in transit, the instruction that the burden of proof was on plaintiff to prove his case by a preponderance of the evidence, and on defendants to prove their defense by the preponderance of the evidence, was apt to confuse the jury, as it might deprive defendant of the benefit of its general and special denials, which did not constitute affirmative matters of defense as to which the burden of proof is on defendant, and might lead the jury to decide that the burden as to plaintiff's right would shift on his making a prima facie case by his own evidence. Quanah, A. & P. Ry. Co. v. Novit (Tex. 1917), 199 S. W. 496.

Where a shipper seeking to recover for injuries to live stock bases his action on negligence of the railroad company instead of its liability as an insurer, he must prove the negligence as alleged. Crow v. Bush (Mo. 1918), 200 S. W. 762.

Where live stock shipper alleged contract was made with defendant carrier through initial carrier, and defendant answered by general issue and non assumpsit, shipper had burden of proving contract as alleged. Illinois Cent. R. Co. v. Walker (Miss. 1918), 77 So. 191.

Where interstate live stock shipper alleged execution of contract with defendant connecting carrier, which failed specially to deny such allegation, Code 1906, § 1974, rendering proof of signature of written instrument unnecessary, unless denied, did not remove burden of proof of execution from shipper, where bill of lading on its face was made by initial carrier only. Illinois Cent. R. Co. v. Walker (Miss. 1918), 77 So. 191.

In action against carrier for decay of car of peaches shipped from Texas to Indianapolis, where there was an inference of full refrigeration from payment of full charge therefor, and there was no showing that the time in transit, about 96 hours, was not reasonable dispatch, mere showing of delivery to initial carrier in good condition and delivery by terminal carrier in bad condition, with testimony that the peaches should have carried 60 to 72 hours under proper refrigeration, did not warrant directed verdict for plaintiff, for, where the inferences as to the carrier's negligence or fault are conflicting and not conclusive, the case is for the jury. Texas & P. Ry. Co. v. Woldert Grocery Co. (Tex. 1918), 199 S. W. 1139.

71. Chicago, R. I. & P. Ry. Co. v. Stouffer (Ind. 1916), 111 N. E. 809.

man, and a failure to redeliver, he makes a prima facie case entitling him to damages, and the burden is then on the warehouseman to explain the loss in a manner not attributable to his negligence.[72] And where a shipper expressly alleged that the goods were in good condition when delivered to the carrier, he has the burden of proving that fact.[73] So if it is shown that cattle are delivered in good condition to a carrier and they reach destination injured, and delay in transportation is shown on the part of the railroad, then it devolves upon the carrier to show an excuse therefor.[74] All that a shipper of live stock which has been delayed in transit is required to prove, is the delay which causes the injury to the cattle. If there is an unreasonable delay, and there is a cause for it which would in law excuse, the facts are peculiarly within the knowledge of the carrier and its agents, and the rule is that it is incumbent upon the carrier to plead and prove it.[75] So where it appears that when potatoes

72. Chicago, R. I. & P. Ry. Co. v. Stouffer (Ind. 1916), 111 N. E. 809.

73. Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas (Tex. 1916), 184 S. W. 1070.

74. Rogers v. T. & P. Ry. Co. (Tex. 1914), 172 S. W. 1117, 1119.

75. T. & P. Ry. v. Martin Bros. (Tex. 1915), 175 S. W., 707, 708.

In suit for loss of or injury to bailed goods, where a failure or refusal of the bailee to return the property on demand is shown, the burden rests upon him to make satisfactory explanation. Perry v. Seaboard Air Line R. Co. (N. C. 1916), 88 S. E. 156, 157.

In an action for damages to a shipment of cotton seed, where a witness testified that he had no express recollection about the particular car of cotton seed, but that he handled all the seed shipped from a gin, and that all shipments were in good condition when shipped out, there was sufficient evidence that the shipment was in good condition when delivered to the initial carrier to sustain a verdict for the shipper. St. Louis, I. M. & S. Ry. Co. v. Home Oil & Mfg. Co. (Ark. 1916), 183 S. W. 176.

In an action by the shippers of live stock, where the complaint alleged the carrier agreed that the stock should not be unloaded in Nashville, Tenn., which agreement the road failed to keep, so that the stock were exposed to pleural pneumonia, and part of them contracted the disease and died, in order for the shippers to recover, it was incumbent upon them to prove that the contract contained the stipulation alleged regarding unloading. Nashville, C. & St. L. Ry. v. Farrell & Braley (Ala. 1916), 70 So. 986.

A vague estimate as to damage to a shipment, based on a witness' ex-

were delivered to the carrier they were matured, ripe, and in sound order, and when the same were delivered to the consignee they were in a damaged condition, a prima facie case of liability is made out against the carrier even though the potatoes were shipped in refrigerator cars, and the burden is upon the carrier to show that the damaged condition of the potatoes was due to no fault or negligence on its part, or that the damage was due to the inherent nature of the potatoes themselves.[76] So where onions in good condition when shipped, and in a commercial sense perishable, were kept in a closed car nearly fourteen days after arrival before notice to the claimant, during which owing to climatic conditions they sprouted and decayed, the jury could find that the resulting loss was caused by the carrier's negligence.[77] The well-settled rule is that, where a shipment of live stock is accompanied by the owner or his agent, and injury results during transit, the burden is upon the owner to show how the injury occurred—i. e., whether it was caused by some actionable negligence upon the part of the carrier; but, where the live stock is not accompanied by the owner or his agent, and injury results during transit, then, when the owner shows that the live stock was in good condition when delivered to, and accepted by, the carrier for shipment, and was in a damaged or injured condition when delivered by the carrier to the consignee at the place of destination, the burden shifts; and, unless the carrier can show that the injury was due to the inherent nature, propensities of viciousness of the animals, the fact of injury is taken as prima facie evidence of actionable negligence upon the part of the carrier in the transportation thereof.[78] Under this rule, where a claimant did not accompany the shipment, it was

amination of 12 to 15 packages out of 327 at the time of receipt, and the amount for which he sold them 30 or 60 days thereafter, held insufficient to warrant submission to the jury of the amount of damage to the shipment. Perkett v. Manistee & N. E. R. Co. (Mich. 1916), 157 N. E. 388.

76. D. & R. G. R. Co. v. A. Peterson Grocery Co. (Colo. 1915), 147 Pac. 663, 664.

77. Garvan v. N. Y. C. & H. R. R. R., 210 Mass. 275, 96 N. E. 717; Hudson v. Baxendale, 2 H. & N. 518; St. Clair v. Chicago, Burlington & Quincy R. R., 80 Iowa, 304, 45 N. W. 570; South Deerfield Onion S. Co. v. New York, N. H. & H. R. Co., (Mass. 1916), 111 N. E. 367, 369.

78. I. C. R. R. Co. v. Word, 149 Ky. 229; McCampbell, etc. v. L. & N. R. Co., 150 Ky. 723, 150 S. W.

sufficient for him to allege and prove the delivery to, and acceptance by the carrier of the live stock in good condition, and that the carrier failed to deliver the same at destination in like condition. It then devolves upon the carrier to show that the injuries were due to the act of God or the public enemy, or to the inherent nature and qualities of the live stock, or to the act or fault of the shipper himself. Unless the carrier can show this, it is liable for loss or injury regardless of whether it was negligent or not. It was, therefore, surplusage for the plaintiff to allege in his petition any negligence upon the part of carrier.[79] The burden does not rest upon the shipper to show just exactly at what part of the transit an injury to his shipment occurred.[80] But in an action against a connecting carrier for injury to live stock through delay and rough handling it is competent for the shipper to prove the appearance and condition of the cattle at the shipping point and at the destination without first showing their condition at the junction point where the connecting carrier received them, if the court charged the jury that the connecting carrier was only responsible for damages occasioned by its own negligence.[81] There is an inference that any injury to goods occurred while they were in the possession of the last carrier; therefore proof that a shipment of corn was dry and

987; L. & N. R. Co. v. McClintock, 151 Ky. 455, 152, S. W. 253; I. C. R. R. Co. v. Howard, 152 Ky. 308, 153 S. W. 427; L. & N. R. Co. v. Cecil, 155 Ky. 170, 159 S. W. 987.

A shipper, accompanying a shipment of live stock, has the burden of proving that injury to the stock was occasioned by the carrier's negligence. Kolkmeyer v. Chicago & A. R. Co. (Mo. 1916). 182 S. W. 794.

A charge in an action for injuries to a shipment of goods, that the burden of proof was on claimant to make out a case is not objectionable, on the theory that when a shipment is delivered in good condition, but arrives damaged, the burden is on the carrier to excuse the injury, the proof not showing without contradiction that the shipment was in good condition when received, and claimant having alleged that it was delivered in good condition, for if the burden on that issue had shifted, such contention should have been presented by an appropriate request. Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas (Tex. 1916), 184 S. W. 1070.

79. L. H., St. L. R. R. Co. v. S. S. H. C. Co., 157 Ky. 772, 164 S. W. 90; N. O. & T. P. Ry. Co. v. Veatch (Ky. 1915), 172 S. W. 89, 90.

80. St. Louis, I. M. & S. Ry. Co. v. Nunley (Ark. 1915), 179 S. W. 369.

81. Houston & T. C. R. Co. v. Lindsey (Tex. 1915), 175 S. W. 709.

sound when delivered to the initial carrier, and was wet and damaged when it arrived at its destination, casts on the connecting carrier the burden of showing its freedom from negligence.[82] Where the evidence shows that when goods were originally loaded they were in good condition and were properly loaded, the presumption is that they remained in that condition until the contrary is shown.[83] In an action to recover the value of hogs which died of cholera during shipment, shipper, having averred that the cars furnished were not clean as required by Rule 31 of the State Sanitary Stock Commission, has the burden of proving that allegation.[84] If perishable goods are in good condition when received by a carrier, but in bad order when delivered, the burden is upon the carrier to show affirmatively that it used reasonable care under all the circumstances to protect the goods from injury during transportation.[85] In an action for negligent carriage of cattle, where defendants pleaded and proved that plaintiffs' contracts gave them special charge of the cattle in transportation, the burden was on the plaintiffs to exonerate themselves for any negligence effecting injury to the cattle, since, if plaintiffs were negligent in that respect, defendants could reduce the damages, to that extent as affecting the amount of recovery based on defendants' negligence.[86] In an action to recover for transporting ties by water, the burden was upon the defendant to prove under counterclaim that plaintiff's negligence caused loss of ties, and upon this being carried, prima facie, by showing failure to deliver, it then developed upon plaintiff to excuse such failure.[87] Where a common carrier receives perishable property in good condition and delivers it at destination in a frozen condition, this establishes a prima facie case of negligence, and the burden is upon the carrier to over-

82. St. L., I. M. & S. Ry. Co. v. Davis (Ark. 1916), 185 S. W. 478.

83. Barrett v. Northern Pac. Ry. Co. (Idaho 1916), 157 Pac. 1016.

84. Clampitt v. St. L. S. W. Ry. Co. of Texas (Tex. 1916), 185 S. W. 342.

85. Fish v. Seaboard Airline Ry. 163 N. Y. S. 439.

86. K. C. M. & O. Ry. Co. v. James (Tex. 1916), 190 S. W. 1136.

87. Osage Tie & Timber Co. v. Gorg-Murphy T. & G. Co. (Mo. 1917), 191 S. W. 1026.

come the presumption.[88] Where it is shown that a shipment was delivered to the original carrier in good condition, the presumption is that it remained so until it arrived in the hands of the terminal carrier.[89]

7. **Competency of Witnesses.** A witness is not required to be an expert to prove the reasonable or market value of goods, such as ordinary wearing apparel and household furniture, where it is apparent from the facts proved that the value of the articles is within the knowledge of persons of ordinary intelligence and experience.[90] It was error to permit the shipper, a veterinary surgeon, and another, to testify that the cattle should not have been held sidetracked in the cars for more than an hour while the cars were being repaired, the testimony being opinion on a mixed question of law and fact.[91] In an action against a railroad for delay in transporting live stock, testimony of a witness, with 25 or 30 years' experience, who knew the distance of the shipment and had traveled with it, as to what he considered a reasonable time within which to transport the live stock in question, was inadmissible as an opinion on a mixed question of law and

88. Victor Produce Co. v. Chicago & N. W. Ry. Co. (Minn. 1916), 160 N. W. 201.

In Victor Produce Co. v. Chicago & N. W. Ry. Co. (Minn. 1916), 201, the court said, p. 202:

"Plaintiff established a prima facie case of negligence by showing that the eggs were in good condition when shipped, and in a frozen condition when received at Duluth; and the burden was upon the carrier to overcome the presumption. B. Presley Co. v. Illinois C. Ry. Co., 117 Minn. 399, 136 N. W. 11; Presley Fruit Co. v. St. Louis, I. M. & S. Ry. Co., 130 Minn. 121, 153 N. W. 115."

89. Equity Elevator Co. v. Union Pac. R. Co. (Mo. 1917), 191 S. W. 1067.

In an action against a railroad by the joint owners of hunting dogs for their death by poisoning when checked, it was no defense that one of the owners was absent when the tickets were purchased by the other owner, and that such absent owner was therefore not a party to the contract, since the purchasing owner acted for the other owner. Louisville & N. O. Ry. Co. v. Dickson (Ala. 1917), 73 So. 750, 751.

The burden is on plaintiff, in an action wherein a third party is garnished, to prove that the answer of the garnishee is not true. Peycke Bros. Com. Co. v. Sandstone Co-op. Co. (Mo. 1917), 191 S. W. 1088.

90. O. K. Transfer & Storage Co. v. Neill (Okla. 1916), 159 Pac. 272.

91. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

fact.[92] While a witness may refresh his memory of a transaction of which he has some independent recollection, by reference to a paper, yet, if he merely has confidence that the paper accurately expresses the facts he once knew, the original, and not a copy, must be produced, or the original's absence accounted for, whether it is to be used as an exhibit, or to be read by the witness.[93] It has been held the wife of the plaintiff can testify concerning the value of household goods.[94] In an action for the loss of freight claim agent of the carrier can testify as to the efforts he made in tracing same and as to its sale as unclaimed freight, and the disposition of the proceeds, where he had personal knowledge of such facts.[95] In an action for loss and damage to a shipment of cattle, it is proper to ask an expert live-stock shipper whether a load of 62 head of cattle, weighing in the neighborhood of 22,000 pounds would overcrowd the car where such person had testified that he had frequently shipped

92. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

93. William R. Mankoff, Inc., v. Erie R. Co., 161 N. Y. S. 346.

94. St. L., I. M. & S. Ry. v. Wallace (Tex. 1915), 176 S. W. 764, 767.

In an action against a carrier for conversion, a witness' testimony that she could enumerate the various articles which were packed or prepared with her assistance, and that she was present and helped pack and load the wagons with the goods that were shipped, and that she testified from what she did and saw herself shows that she was fully qualified to testify to the identity of the property. Pecos & N. T. Ry. Co. v. Porter (Tex. 1916), 183 S. W. 98, 99.

95. St. L., I. M. & S. Ry. v. Wallace (Tex. 1915), 176 S. W. 764, 766.

Error was committed by the trial judge in refusing to permit further cross-examination, under chapter 4 of the Laws of 1907, of one who was claimed to be a managing agent of a railway company, on the ground that the court could not see that the claimant could show such person to be a managing agent, after such witness had testified that he had been in the employ of the carrier company for 21 years, that during such time he had been operator, station agent, trainmaster, live stock agent, freight transfer agent, assistant superintendent, and general agent; that at the time of the trial he was general agent of the company, and as such general agent had charge of the business of soliciting freight up and down the line of the company and solicited the freight from the claimant during the times covered by the suit; and, also, that he had taken part in trying to get a settlement for the claimant. Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co. (N. D. 1916), 156 N. W. 1019.

from 22,000 to 28,000 pounds in a car without overcrowding.[96] In a case involving injury to live stock the shipper introduced evidence tending to show that the car was overcrowded and that this occasioned injury to part or all of the cattle. On rebuttal the carrier called witnesses who testified that they were familiar with

96. Golsch v. Chicago M. & St. P. Ry. Co. (Iowa 1915), 153 N. W. 327, 329.

In an action for negligent carriage of cattle, an experienced cattleman may qualify to testify what the condition of cattle would be if confined in cars from 40 to 43 hours without unloading, although such witness has never accompanied a shipment of cattle. K. C. M. O. Ry. Co. of Tex. v. James (Tex. 1916), 190 S. W. 1136.

One engaged in buying and selling cattle on the market may give opinion as to value of cattle which he has not seen. Bush v. Altschul (Ark. 1917), 193 S. W. 280.

A consignee engaged in the marketing business can testify as to the market price of poultry on a certain day. The Producers' Price Current, a produce paper containing current market quotations, is competent evidence of market value. Stewart Poultry Co. v. Erie R. Co. (Kan. 1917), 163 Pac. 448.

In an action by consignee for damages to sweet potatoes shipped, such consignee, having been a farmer raising and handling sweet potatoes for 20 years or more, was qualified to testify as to the value for eating purposes of sweet potatoes after going through a heat. Houston, E. & W. T. Ry Co. v. Brackin (Tex. 1917), 191 S. W. 804.

In A. C. L. Ry. Co. v. Enterprise Cotton Oil Co. (Ala. 1917), 74 So. 232, the court said, 235:

"One of the plaintiff's witnesses, who it appears was either engaged in the work or was superintending the loading of the car, after stating his experience of 12 years in loading oil tank cars, was permitted to testify that this car was properly loaded. Defendant's objection to the question on the ground that it was a question for the determination of the jury and was not the subject of expert testimony was overruled, and the ruling of the court is assigned as error. A similar question was treated in McCarthy & B. v. L. & N. R. R. Co., supra, wherein the court said:

"'The only * * * error we find in the record lies in the exclusion of the testimony of the witness Slater, to the effect that these cars were "well and carefully loaded." This was the mere opinion of the witness, it is quite true. but we think a sufficient predicate had been laid to render his opinion on that subject compent evidence.'

"The following authorities are also cited as supporting that view: So. Ry. Co. v. Stollenwerck, 166 Ala. 556, 52 South. 204; Stoutz Mt. Coal Co. v. Tedder, 189 Ala. 637, 66 South. 619; Cohn & Goldberg Co. v. Robbins, 159 Ala. 289, 48 South. 853; Hood v. Disston & Sons, 90 Ala. 377, 7 South. 732; St. L. & S. F. R. R. Co. v. Brantley, 168 Ala. 579, 53 South. 305; Shook v. Pate, 50 Ala. 91; Spiva v. Stapleton, 38 Ala. 171."

Where a witness stated his experience of 12 years in loading oil tank cars, sufficient predicate was laid to

cars such as that conveying the cattle, and that 62 head of cattle such as those hauled might be placed in a car without overcrowding. An objection was made that this was not proper expert testimony, and not based on facts disclosed. Held, the testimony related to matters not familiar to the ordinary juror and hence

permit his testimony that a car was properly loaded. Atlantic Coast Line Ry. Co. v. Enterprise Cotton Oil Co. (Ala. 1917), 74 So. 232, 233.

In an action against a carrier for loss by poisoning of hunting dogs checked by owners, the question to a doctor, "if an animal is affected with the symptoms you have enumerated, and seven of them died from a period of four hours to a period of two or three days, what would you say was the cause of their death?" and his reply, "I think it was arsenic poisoning," were proper; the question being supported by the testimony adduced and the answer being responsive. L. & N. R. Co. v. Dickson (Ala. 1917), 73 So. 750.

Where there was no objection to a hypothetical question to a medical expert, it was not error for the trial court to overrule a motion to exclude his answer. L. & N. R. Co. v. Dickson (Ala. 1917), 73 So. 750.

Testimony by persons who made affidavits to the weight of grain shipped that they could not recollect the weight without their records, but had memoranda from which they could recall the facts, does not show that the witnesses had no personal knowledge of the facts to which they made affidavit. Shellabarger Elevator Co. v. Ill. Cent. R. Co. (Ill. 1917), 116 N. E. 170.

Testimony of witnesses, not shown to be experts, that in their opinion maize, claimed to have been injured in cars, was ruined by being rained on while in the field on the ground, is nothing more than a guess, and inadmissible. Patterson & Roberts v. I. A. & P. Ry. Co. (Tex. 1917), 195 S. W. 1163.

A witness is qualified to testify to market value of maize at a certain place, there being no denial of his testimony that he had shipped much maize there, and was acquainted with market value there. Patterson & Roberts v. I. A. & P. Ry. Co. (Tex. 1917), 195 S. W. 1163.

Opinion testimony of qualified witnesses that cattle held at destination two days before selling will probably shrink in weight 3 per cent may be admissible to prove a claim for shrinkage after arrival, where the weight of the cattle on arrival at destination and before watering and feeding and their selling weight tend to show that the cattle did not "fill" the usual amount, Underwood v. Chicago & N. W. R. Co., 100 Neb. 275, 159 N. W. 408, distinguished. McElwain v. U. P. R. Co. (Neb. 1917), 163 N. W. 845.

Witnesses must speak, however, from some knowledge of the facts. They must not simply guess at matters, nor are they entitled to express opinions on matters not the subject of opinion by expert testimony.

Where a witness testified that no market existed for cattle, as injured by carrier's negligence, evidence as to his opinion as to their market value was inadmissible. Ft. W. & R. G.

was competent.[97] A shipper cannot testify, in his opinion, what is a reasonable time to make a run, since what is a reasonable time to make a railroad trip is a question of mixed law and fact for the jury to decide.[98] Witnesses who have had several years experience in the cattle business and are familiar with the effect upon cattle dipped in arsenic and in crude oil are sufficiently qualified as experts to testify to the injury caused to cattle by dipping in crude oil.[99] There is no error in permitting a witness to testify as to the market value of horses in the condition they arrived and what it would have been if they had been delivered in the time and manner they should have been.[100] But a shipper should not testify as to what is his opinion of the difference in value between a shipment when it arrived and its value had it arrived within a reasonable time. His testimony should be as to what is the actual difference.[101] But a witness testifying as to

Ry. Co. v. Bryson & Burns (Tex. 1917), 195 S. W. 1165.

In a shipper's action for damages due to a delayed shipment of live stock, the evidence of an expert as to the weight of the cattle was properly admitted. I. & G. N. Ry. Co. v. Mudd (Tex. 1917), 194 S. W. 960.

In a shipper's action for damages due to a delayed shipment of live stock, a witness, qualified as an expert, might testify as to the time it usually took to make the trip between the point of shipment and destination. I. & G. N. Ry. Co. v. Mudd (Tex. 1917), 194 S. W. 960.

97. Golsch v. C. T. & S. P. Ry. (Ia. 1915), 153 N. W. 327.

In an action against a railroad company for injuries to a shipment of live stock, testimony as to admissions made by a brakeman of the defendant company, but who was not running on the train carrying the shipment, is inadmissible; for the admissions of an agent can only be received against his principal when they are made as a part of the work or business he is doing or transacting. Robinson v. Bush (Mo. 1918), 200 S. W. 757.

Testimony by a railroad agent as to messages conveyed between himself and shipper by shipper's agent as to the order of the railroad company not to place the cotton which was later destroyed by fire on the company's platform, unless for immediate shipment, held admissible, since shipper's agent was acting within the scope of his authority. W. F. Bogart & Co. v. Wade (Ark. 1918), 200 S. W. 148.

98. Gulf C. & S. F. Ry. Co. v. Bogy (Texas 1915), 178 S. W. 577, 578.

99. Missouri K. & T. Ry. Co. of Texas v. Cauble (Texas 1915), 174 S. W. 880, 882.

100. Gulf C. & S. F. Co. v. King (Texas 1915), 174 S. W. 960, 961.

101. G. C. & S. F. Ry. Co. v. Bogy (Tex. 1915), 178 S. W. 577.

market value, must be qualified on the subject. Where in a suit for damages to a shipment of live stock a witness for claimant had testified that he did not know the market value of such cattle at destination, his estimate that, if the cattle had reached destination in good condition, they would have been worth on the market from $1.50 to $2.50 a head more than in the condition when they arrived, was a mere guess and inadmissible.[102] In an action for damage to a shipment of bananas, one saying he was a practicing physician was improperly allowed, over defendant's objection, to testify as to the market value of bananas by the hundred pounds at the point of shipment, where he had previously stated he could not say he had ever seen the bananas in controversy, did not know how many bunches were in a car, and did not know their grade.[103] But where a witness testifies that during a certain season he was engaged in shipping fruit to certain markets, and daily received telegrams and advices from different dealers in that commodity concerning the value of the fruit, and also received information by sale bills and wires, and, based on that information, he knew what the market price was on that date, such evidence was competent.[104] In an action for delay and injury to a shipment of live stock, a witness engaged in the wholesale buying and selling of horses and mules, who had made shipments to destination, and who testified that the market to which he shipped was practically the same as at other places in that section of the country, was properly qualified to testify that the market value of the shipment was greater at destination than at the point of origin of the shipment.[105] A shipper can testify as to the usual and customary time it takes to transport a shipment between given points. A reasonable time for the shipment is so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In determining what is a reasonable time or an unreasonable time, regard is to be had to the facts of the particular case. A reasonable time,

102. St. Louis Southwestern Ry. Co. of Texas v. Kerr (Tex. 1916), 184 S.W. 1058.

103. Illinois Cent. R. Co. v. Freeman (Tex. 1916), 182 S. W. 369.

104. Louisville & N. R. Co. v. McHan (Ga. 1916), 87 S. E. 889, 890.

105. Texas & P. Ry. Co. v. De Long (Tex. 1915), 176 S. W. 874.

when no time is specified, is a question of law and fact for the jury to decide under proper instructions.[106] A witness who qualifies as an expert concerning the condition of shipments of vegetables is competent to testify that a car containing perishable produce has been roughly handled, in that he found most of the freight smashed and lying on the floor of the car and that any man of average intelligence would know that nothing but rough handling could have produced such results.[107] The testimony of an experienced stockman as to what extra shrinkage a specified delay in transportation would produce on cattle is admissible.[108] The testimony of men who have been engaged for many years in the buying and selling and handling of live stock, and the shipment thereof, as to the effect upon cattle of delays in shipment, is not mere speculation and guesswork, but its reliability depends largely on the experience and fairness of such witnesses, though of course their judgment as to the extent of shrinkage or depreciation is not reducible to anything like a mathematical certainty.[109] But the competency of a witness to testify as to the shrinkage of cattle is primarily a question for the trial judge to determine. Unless his decision is manifestly erroneous, it cannot be disturbed on appeal.[110] A shipper of

106. Gulf C. & S. F. Ry. Co. v. Bogy (Tex. 1915), 178 S. W. 577, 579.

107. San Antonio & A. P. Ry. Co. v. Bracht (Tex. 1915), 172 S. W. 1116.

One having an experience of 15 or 20 years of shipping live stock may testify that it is usual and customary to bed cars with sand or hay to enable stock to stand. Missouri K. & T. Ry. Co. of Texas v. Ryon (Tex. 1915), 177 S. W. 525.

In an action for injuries to live stock in shipment, testimony by the shipper as to the ordianry shrinkage of cattle under proper shipment, if they were properly handled, is not an opinion on a mixed question of law and fact, since the expressions "proper shipment" and "properly handled" do not refer to the condition of the cattle under the shipment in question, but to the usual and ordinary shrinkage of cattle of that class when shipped. Chicago R. I. & G. R. Co. v. Gore (Tex. 1915), 176 S. W. 778.

108. T. & P. Ry. Co. v. Martin Bros. (Tex. 1915), 175 S. W. 707, 708.

109. G. C. & S. Ry. Co. v. J. A. Bowers & Son (Tex. 1915), 175 S. W., 861, 862.

110. T. & P. Ry. Co. v. Martin Bros. (Tex. 1915), 175 S. W. 707, 708.

In a suit for injuries to cattle in shipment, a witness, though an ex-

cattle with considerable experience can testify that pens in which the cattle have been unloaded and confined en route were too small, where such witness before expressing his opinion detailed the facts as to the sufficiency of the pens; since a non-expert witness is allowed to express his opinion, when in so doing he at the same time details the facts and circumstances upon which same is based.[111] A shipper of cattle can testify that they were in worse condition when they reached destination than they would have been had they been transported in the usual and ordinary way, where such shipper had considerable experience in shipping cattle and had made many shipments between the points involved.[112] In an action against an express company for injuries to a colt from being left over night in a barn having a defective floor, the testimony of expert witnesses that, in their opinion, the barn was unsafe, was properly admitted, where the opinions were based on conditions which witnesses saw and afterwards described to the jury.[113] In an action for loss and damage to frozen potatoes, the testimony of the shipper that the potatoes were worth $1.35 per bushel when purchased and the market value was $1.35 per bushed and that the frozen potatoes were absolutely worthless, is sufficient to support a judgment, although it does not specifically state that

pert, cannot state his conclusion as to the depreciation which the cattle would have suffered by ordinary shipment and the depreciation they suffered as it was; the question of depreciation being for the jury's determination, and the witness assuming it. Pecos & N. T. Ry. Co. v. Holmes (Tex. 1915), 177 S. W. 505.

Claimant, who had shipped hogs a number of times, may testify as to the normal shrinkage of hogs resulting from shipment. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916), 182 S. W. 361.

In an action by shippers of live stock for delay in transit, where the petition alleged only that the cattle should have arrived on a certain date, but did not, whereby the shippers were compelled to hold them over for the next market, proof of an additional shrinkage in weight after arrival and of the decline in the market at which the cattle were sold was inadmissible for want of basis in the pleadings. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916), 183 S. W. 384.

111. Houston & T. C. R. Co. v. Lindsey (Tex. 1915), 175 S. W. 708, 709, 710.

112. Houston & T. C. R. Co. v. Lindsey (Tex. 1915), 175 S. W., 709.

113. U. S. Horseshoe Co. v. American Express Co., 95 Atl. 706.

the value referred to was the value at destination.[114] Where cattle were delivered in different cars from those in which they were shipped, the evidence shows conclusively they had been unloaded en route.[115] Although it appears that cattle are weak when shipped, still if there is evidence to show that they were not too weak and poor to ship and that there was a delay of two days and rough handling, a judgment of damages for death will not be reversed on appeal.[116] In an action for delay one of the principal grounds of defense relied upon was that delay complained of was unavoidable, and due to destruction (by fire for which carrier was not responsible) of a bridge on a line of connecting carriers. The shipper introduced evidence that another shipment made at the same time from the same place, arrived a day earlier. Held, the mere fact that this so-called "parallel shipment" was made on a different train from that on which the plaintiffs' stock was shipped does not in itself make the evidence inadmissible. The proximity in point of time, and the identity of the route and termini, bring the evidence clearly within the general principles set out in Riverside, etc., Cotton Mills v. Waugh, 117 Va. —, 84 S. E. 658, as to the admissibility in evidence of collateral events and occurrences which are similar to those forming the subject of the controversy.[117]

114. G. H. & S. R. Ry. v. Brown (Tex. 1915), 175 S. W. 749.

115. G. C. & S. F. Ry. Co. v. J. A. Bowers & Son (Tex. 1915), 175 S. W. 861.

116. International & G. N. Ry. Co. v. Frank (Tex. 1915), 177 S. W. 168.

117. Norfolk & W. Ry. Co. v. A. J. Steele & Son (Va. 1915), 86 S. E. 124, 127. See also Mich. Cent. R. Co. v. Curtis, 80 Ill. 324, in which it was held that the loss of a depot was not sufficient excuse for delay when it appeared that subsequent shipments over the same road reached their destination in advance of the shipment involved in the suit.

In an action by shippers of live stock for delay in transit, testimony of a claimant, on cross-examination as to his testimony in another action, tending to show that it would take a longer time to make a shipment of cattle from the shipping point to destination than was testified to by him, was admissible. International & G. N. Ry. Co. v. Landa & Storey (Tex. 1916), 183 S. W. 384, 385.

In an action for injuries to a shipment of peanuts, testimony that the peanuts, if in proper condition when shipped, would keep for a longer time than that of the shipment, given by experienced dealers, though not of the locality, is admissible. Cleburne Peanut & P. Co. v. Missouri K. & T. Ry. Co. of Texas (Tex. 1916), 184 S. W. 1070.

8. Admissibility of Evidence. The general rules of law govern the admission of evidence in loss and damage cases. In other words, there are no special rules of evidence applicable particularly to this kind of litigation, which distinguishes it from any other. Certain presumptions help out the plaintiff, and the Interstate Commerce Act to some extent defines the possible procedure as well as certain substantive rights, but the admission of testimony is governed by the common law and the state

In an action against a carrier for refusing to deliver goods to a connecting line, evidence that it constantly refused to make such deliveries is admissible, where the evidence conflicted regarding defendant's refusal to deliver and its reasons therefor. Quanah, A. & P. Ry. Co. v. Bone (Tex. 1917), 199 S. W. 332.

While ordinarily evidence regarding similar wrongs inflicted on others is inadmissible, yet evidence showing a universal rule or system is admissible. Quanah, A. & P. Ry. Co. v. Bone (Tex. 1917), 199 S. W. 332.

An exception is not necessary, where an instruction has charged defendant on an entirely wrong theory. Barden v. N. Y. C. R. Co., 168 N. Y. S. 742.

In an action against a railroad company for injuries to a shipment of live stock, the erroneous reception of evidence of admissions of the railroad company's agent not made in the course of his employment cannot be treated as harmless because cumulative of other evidence of the company's negligence. Robinson v. Bush (Mo. 1918), 200 S. W. 757.

In an action against a carrier for damage to a shipment of cattle, a brakeman was asked, in taking his deposition, whether he was present and heard the conductor request the party in charge of the calves to unload some of them as the car was overloaded, and if so to state fully what they said. In part of his answer he stated that the car was jammed full and too full. He was also asked to state whether he was present and heard the conductor inform those in charge of the loading that they could not load any more calves into the car, and if they did not insist upon loading nine head more, and to state fully what occurred during the loading of the calves. Part of his answer was that this was the worst crowded car of cattle he had ever seen in 14 years of railroading. Held that the portions of the answers referred to were not responsive to the questions, and should have been stricken on motion. Massey v. Texas & P. Ry Co. (Tex. 1918), 200 S. W. 408.

In a consignee's action against a carrier for damages to a shipment of tomatoes, the consignee's bills and the ledger account showing the amount charged to the parties to whom the tomatoes were sold, presumably on account of their damaged condition, without evidence to show that the items represented the actual damage, were properly excluded. United Brokers' Co. v. Southern Pac. Co. (Ore. 1917), 169 Pac. 114.

While in a proper case parol evidence may generally be competent to

statutes. Each objection to testimony therefore presents an instance to be judged under the general law with reference to the particular situation in which it arises. Specific instances, therefore, as affected by the general rules, afford the best guide in determining whether certain evidence is admissible in loss and damage cases. Questions of evidence, and of the admissibility of the various kinds of evidence in particular cases are, however, so interwoven with every part of the subject of loss

show what transpired between the parties in connection with a shipment over a railroad, in order to determine whether a valuation stated in the bill of lading, which was signed by both parties, was an actual valuation or an arbitrary limitation upon liability which might arise from negligence of the common carrier, where there was a written compact signed by the agents of both parties, it was not competent for the agent of the shipper, on the trial of an action for damages resulting from injuries to the shipment, to testify baldly that he made no agreement as to the value of the property, though admitting that he signed the contract. Atlanta & West Point R. Co. v. Fairburn Marble Co. (Ga. 1916), 89 S. E. 817.

The court did not err in refusing to permit certain witnesses for the defendant to testify as to what would be a reasonable time for the transit of like shipments between the two points in question, the defendant being allowed to introduce evidence as to the usual and customary time of such shipments between the two points. Southern Ry. Co. v. Bloch (Ga. 1916), 90 S. E. 656.

In an action for damages to a shipment of goods, evidence to show that the shipper, the consignor in the bill of lading, and not another, was the owner of the goods was competent. Whittington v. Southern Ry. (N. C. 1916), 90 S. E. 505.

Plaintiff's testimony that there was no attempt to feed and water the stock at any other than a certain place, in view of his 36-hour release, whereby the carrier was authorized to keep the stock in the cars for that time without feed, water, or rest if necessary, was inadmissible. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

In an action against a railroad for injuring cattle shipped, to be placed on pasture in ranches near the point of destination, it was permissible for a witness to testify as to their market value in that section of the country, where he also testified that their market value would be the same all over that section, which included the point of destination. Hovey v. Kirby (Tex. 1916), 189 S. W. 794.

In an action against the initial and connecting carriers of a shipment of live stock, where the judgment was in favor of the connecting road, and no complaint made of it, the question of the admissibility of testimony of plaintiff that he signed without reading the written contract of shipment, limiting the initial carrier's liability for damages to the cattle to injuries sustained on its own line, became immaterial and

and damage that they are in most cases best considered in connection with the particular branches of the subject to which they relate. It remains only to here consider certain holdings as to the admissibility of evidence of a more general nature.[118] For instance, in an action for injuries to household goods it has been held that evidence is admissible to show that such goods had been shipped uncrated for long distances without injury.[119]

9. **Judicial Notice.** The courts take judicial notice of facts of everyday knowledge in loss and damage cases the same as in any other kind of litigation. Thus it is a matter of general knowledge, of which courts will take judicial notice, that common carriers by rail make a practice of carrying as baggage the sample trunks of traveling salesmen.[120] And the Supreme Court of the United States will take judicial notice of the fact that the raising of citrus fruits is one of the great industries of

unnecessary to be decided. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

Testimony, to rebut the imputation of the road's negligence in failing to have employes present in its yards ready to make heavy repairs as soon as the necessity therefor was discovered, that other roads operating in the city where the delay occurred kept no such employes on hand at night, but depended on calling them whenever their services were needed, was admissible, since unless the conduct of a business in a certain manner is negligence per se, proof that others, in the same line of business, are in the custom of following the same course is admissible, as tending to show that the method adopted is not negligent. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

In an action for damages to a shipment of live stock, testimony of plaintiff, as to a conversation which he heard between the conductor of his train and some employes of the road's receivers relative to the cause of the wreck which delayed the shipment, was inadmissible, where the conductor was not shown to be authorized to make such statements. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

In such case, where it was admitted that defendant had not attempted to feed and water the cattle at any other than at a certain place, it could not have been reversible error to permit plaintiff to testify to that fact. Kansas City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

119. Best. v. G. N. Ry. (Wis. 1915), 150 N. W. 484, 486.

120. K. C., M. O. Ry. Co. v. Fugatt (Okla. 1915), 150 Pac. 669, 670.

Florida.[121] A court takes judicial notice of the way in which the business is handled in the stockyards in Chicago.[122] A court will take judicial knowledge of the meaning of the term "milling in transit privilege," and the admission of oral evidence to explain the same is not error.[123] A court cannot judicially know, nor can a jury from common knowledge say, that mud and water two inches deep is injurious and uncomfortable to hogs during summer months.[124] But a court cannot take judicial notice of the fact "that onions are perishable property, and that a delay in shipment will spoil them."[125] And a court cannot take judicial notice of ownership of railroad merely because proved in another case.[126] It is a matter of common knowledge that railroads maintain claim departments whose duty is to investigate claims against the carriers.[126a] Courts cannot take judicial notice of what percentage of mineral can be extracted from a particular class of ore, which is a matter of proof in each particular case where material.[126b] It is a matter of common knowledge that in a short haul of 50 or 60 miles the damage to a carload of apples by reason of heating will not be appreciable.[126c] In an action by the consignee of hay against the railroad which carried the shipment for damages from failure to permit adequate inspection, evidence held to show that the notation on the bill of lading. "Allow inspection," is uni-

121. Sligh v. Kirkwood, 35 Sup. Ct. 501, 503; 237 U. S. 52; 59 L. Ed. 835.

122. Hudson & C. St. P., M. & O. Ry. Co., 226 Fed. 38, 44.

123. St. L. & S. F. Ry. Co. v. Bondies & Co. (Okla. 1917), 166 Pac. 179.

124. Ft. Worth & D. C. Ry. Co. v. Atterberry (Tex. 1916), 190 S. W. 1133.

125. Williams R. Mankoff, Inc. v. Erie R. Co., 161 N. Y. S. 345.

126. Ill. Cent. R. Co. v. Walker (Miss. 1918), 77 So. 191.

126a. Babbitt v. Grand Trunk Western Ry. (Ill. 1918), 120 N. E. 803.

126b. Dixon v. Southern Pac. Co. (Nev. 1918), 172 Pac. 368.

126c. Missouri Pac. R. Co. v. Fields Bros. (Ark. 1918), 203 S. W. 1036.

It is a matter of common knowledge that neither the Oregon Short Line Railroad nor the Lake Shore & Michigan Southern Railroad maintain tracks in Massachusetts. New York Cent. & H. R. R. Co. v. York & Whitney Co. (Mass. 1918), 119 N. E. 855.

versally understood by shippers and railroads to mean a side-door inspection of the freight.[126d]

10. **Questions for Jury.** Naturally the jury play a most important role in loss and damage cases. In all these claims, almost without exception, the contentions of the claimant and the carrier present diametrically opposed contentions of fact, which it is the duty of the jury to settle. In an action against a carrier for damages to a shipment of hogs occurring while in its loading pens, the question of whether there was a delivery and acceptance by the carrier or due care on the part of plaintiff in placing the hogs in the pen and the condition of the pen, are questions of fact for the jury.[127] It is a question for the jury to say whether a shipper of live stock is in the exercise of reasonable diligence in not shipping his hogs by a regular freight train instead of waiting for a regular live stock train in order to reach a certain market by a designated time, where it appears that the freight train would not stop and that when the train was not in motion the hogs would fight and injure themselves,

126d. Houston, E. & W. T. Ry. Co. v. Ratcliff (Tex. 1918), 202 S. W. 525.

If initials "O R S L & C" on a bill of lading following description of goods were within the general information of the court, and were in themselves plain enough to permit judicial construction, it would be unnecessary to prove their import. Lewis Poultry Co. v. New York Cent. R. Co. (Me. 1918), 105 Atl. 109.

If initials "O R S L & C" on bill of lading following description of goods were not within the general information of the court, and were not plain enough to permit judicial construction, it would be competent to prove their import; the words being of particular significance in freight transportation. Lewis Poultry Co. v. New York Cent. R. Co. (Me. 1918), 105 Atl. 109.

In the absence of pleading or proof as to the statutory law of another state, it is presumed that the common law is in force in such state, and the rights of the parties will be determined under its rules applicable thereto. Dettis v. Western Union Telegraph Co. (Minn. 1918), 170 N. M. 334.

127. Reading v. C. B. & Q. R. Co. (Mo. 1915), 173 S. W. 451.

In an action against an express company for the value of a typewriter which it had refused to deliver to the consignee on his payment of charges, held on the evidence that whether the willful refusal was ratified by an officer of the company empowered to do so was for the jury. Southern Express Co. v. Reagin, 228 Fed. 14.

In an action against a carrier of live stock for damage to a shipment

while they would not do this when the train was in motion.[128] The Federal Twenty-eight Hour Law, which fixes the time cattle can be kept in transit by the railway company at 28 hours, is not a grant of privilege to the carrier authorizing it to confine the stock for the period of time therein mentioned, irrespective of the question of negligence in so doing. The question of negligence is still left as at common law, notwithstanding the statutes.[129] The question as to whether a shipment of horses was in proper condition for transportation or whether they were damaged through rough handling on the part of the carrier, is exclusively one for the jury.[130]

through becoming infected when unloaded at a stockyard for resting in transit, claimant's case, under a count of the complaint declaring on the carrier's negligence as a common carrier in violation of its legal duty, held for the jury. Nashville, C. & St. L. Ry. v. Farrell & Braley (Ala. 1916), 70 So. 986, 987.

128. J. W. Stewart & Son v. C. R. I. & P. Ry. Co. (Ia. 1915), 151 N. W., 485, 487.

129. Durrett v. Chicago, R. I. & P. Ry. Co. (N. Mex. 1915), 146 Pac. 962, 963.

130. U. P. R. R. v. Libby (Colo. 1915), 146 Pac. 1076.

It is a question for a jury whether the sickness and death of horses shipped via an express company is the natural and probable result of negligent delay in transit. Plass v. Barrett, 168 N. Y. S. 107.

The question of negligence must be submitted to the jury as one of fact, not only where there is room for a difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. New York & Porto Rico S. S. Co. v. Guanica Centrale, 231 Fed. 820.

Where the question of defendant's negligence was one which could properly be submitted to the jury, the jury's conclusion that defendant was negligent could not be reviewed. New York & Porto Rico S. S. Co. v. Guanica Centrale, 231 Fed. 820.

The inference from an uncontradicted statement of one of the parties directly interested in the result of the suit is for the jury. Yazoo & M. V. R. Co. v. Altman (Ark. 1916), 187 S. W. 656.

Where the evidence is susceptible of more than one inference, the question whether a carrier failed to transport goods with reasonable dispatch was for the jury, and the trial court could not direct a verdict without invading the province of the jury. Van Epps v. Atlantic Coast Line R. Co. (S. C. 1916), 89 S. E. 1035.

In an action for damage to a shipment of hogs, where there was a

conflict in the testimony as to weather conditions, delivery to the carrier as such, amount of damage and loss suffered, and ownership of the hogs, these questions were for the jury. Mackin v. Minneapolis & St. L. R. Co. (Ia. 1916), 157 N. W. 729.

Whether goods shipped are delivered within a reasonable time is a question of fact for the jury, and depends on the facts of each case, including the usual and ordinary time required for carriage between the two points, the preparations made by the carrier, whether ample or not, its effort or lack of effort to properly dispatch the goods, the information given by the shipper to the carrier as to any special reasons for speedy transit and delivery, the character of the shipment, and kindred circumstances. Southern Ry. Co. v. Block (Ga. 1916), 90 S. E. 656, citing Columbus & Western Ry. v. Flournoy, 75 Ga. 745 (2).

In an action for damages to a shipment of live stock, plaintiff's testimony, as to the value of the cattle at destination when they should have arrived if handled in the usual ordinary time and with due dispatch, was a mixed question of law and fact, invading the province of the jury, and inadmissible. Kansis City, M. & O. Ry. Co. of Texas v. Corn (Tex. 1916), 186 S. W. 807.

In an action against a carrier of live stock for delay in transporting a shipment, carrier's contention, supported by evidence, that after the arrival of the shipment at a connecting point it repaired defective cars and delivered to the connecting road as quickly as possible under the circumstances should have been submitted to the jury in an affirmative form. Ft. Worth & D. C. Ry. Co. v. Gatewood (Tex. 1916), 185 S. W. 932.

Where there is evidence that there was no delay or failure to ice that would cause the meat to decay, the question of the cause of the spoiling of the meat is for the jury, since they could infer such cause was an inherent defect in or improper preparation of the meat. Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co. (Mo. 1916), 187 S. W. 149.

Whether or not the presumption of negligence, which arose as a matter of law against the carrier upon proof of the loss of the cattle in transit, was sufficiently rebutted, was a question solely for determination by the jury, and, while the testimony appears to preponderate largely in favor of the carrier, there was some evidence from which the jury might infer a lack of that degree of diligence which the special contract required of the carrier, and this court therefore cannot say that the verdict was without any evidence to support it. Western & A. R. Co. v. Waldrip (Ga. 1916), 89 S. E. R. 346.

The verdict of the jury on all issues of fact constitutes the sole basis for the judgment. Houston & T. C. Ry. Co. v. Lewis (Tex. 1916), 185 S. W. 593.

Because a question of fact is close is no reason for taking it out of the jury's hands. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

Where there was evidence that the hogs had become warm by piling up in the car, and then were unloaded into pens over the protest of the carrier's agent, the question as to the disease from which the hogs died, or what caused it, held for the jury.

11. **Argument of Counsel.** In an action for injury to live stock it is improper for the attorney of the claimant to use as an argument to the jury, the fact that the railroad witnesses testified as they were told, in order to hold their jobs.[131]

12. **Instructions, Verdict and New Trial.** As in other cases, a verdict of a jury in this class of litigation will not be set aside except for clear and convincing reasons. That is, the trial court should be convinced the verdict is clearly against the weight of the evidence. The instructions of the court are therefore an important factor, and if incorrect or biased may easily work considerable harm to either side. An instruction to the jury in a

Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

In an action against a succeeding carrier for damages to an interstate shipment of hogs because of delay in delivery, whether an understanding between the shipper and the defendant, that the shipment should be subject to delay because of a bridge being out, was made before the defendant accepted the shipment for transportation, held for the jury. Bowles v. Quincy, O. & K. C. R. Co. (Mo. 1916), 187 S. W. 131.

In an action against a railroad for damages caused by delay in transporting potatoes, question as to whether the cars were moved to their destination within a reasonable time held for the jury. Loveland & Hinyan Co. v. Waters (Mich. 1916), 159 N. W. 477.

When any competent evidence has been presented for the consideration of the jury reasonably tending to prove the issues, it is proper to overrule a demurrer to the evidence or deny a motion for preemptory instruction; for in such a condition, under proper instructions from the court, the cause should be submitted to the jury for their determination. St. Louis & S. F. R. Co. v. Akard (Okla. 1916), 159 Pac. 344.

In an action against a steamship carrier for failure to deliver a cargo destined to Guanica, Porto Rico, due to the fact that, after docking at San Juan, quarantine regulations prohibited the steamer from docking at Guanica, evidence held to make a question for the jury as to whether carrier was negligent in docking at San Juan, instead of first sending the steamer to other ports, or lightering the San Juan cargo. New York & Porto Rico S. S. Co. v. Guanica Centrale, 231 Fed. 820.

The question of the seaworthiness of a vessel includes the question of whether or not she was overloaded. The Benjamin Noble, 232 Fed. 382.

In an action for injuries to cheeses damaged during ocean transportation, the question whether the injuries were caused by the perils of the sea or the unseaworthiness of the vessel held for the jury. Galle v. Hamburg Americkanishe Packetfahrt Actien Gesellschaft, 233 Fed. 426.

131. K. C., M. & O. Ry. Co. v. Cave (Tex. 1915), 174 S. W. 872, 874.

loss and damage case, that it may indulge the presumption, in the absence of direct evidence of negligence on the initial carrier's part, that the damage did not result from its negligence, but did result from negligence on the part of the delivering carrier is proper.[132] A charge of the trial court told the jury that

132. Stolze v. Ann Arbor R. Co., 148 Wis. 205, 134 N. W. 376; Tradewell v. Chicago & Northwestern R. Co., 150 Wis. 259, 136 N. W. 794; Best v. G. N. Ry. (Wis. 1915), 150 N. W. 484, 486.

In an action against a railroad for damages to five carloads of mules in transit through the carrier's failure to sand the floor of the cars, so that the mules were thrown down repeatedly and incited to kick and bite, verdict for $900 held not excessive. Blair Horse & Mule Co. v. St. Joseph & G. I. Ry. Co. (Mo. 1915), 180 S. W. 412.

Where there was a conflict in the testimony of the witnesses, an instruction that, if the jury believed that any witness had knowingly sworn falsely to any fact material to the issues, they might reject all or any part of his testimony, was proper. Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co. (Mo. 1916), 181 S. W. 1080, 1081.

Where the only issue in the case was whether the cotton was placed on the platform for immediate shipment and received by the railroad company for that purpose, the modification of an instruction on carrier's liability for loss, by adding to the words "placed on the platform in the usual way" the words "for shipment," was proper. W. F. Bogart & Co. v. Wade (Ark. 1918), 200 S. W. 148.

There is no variance between proof that defendant carrier delayed shipments at junction point with another carrier at a certain date, and allegations that the goods were delivered to defendant a month previous to such date. Quanah, A. & P. Ry. Co. v. Bone (Tex. 1917), 199 S. W. 332.

Where, in an action by insurer in the name of the insured to recover against a railroad company for cotton destroyed by fire by sparks from defendant's engine while such cotton was on defendant's platform awaiting shipment, the evidence was conflicting, as to whether the cotton had been so placed for immediate shipment, the question of control and possession of the cotton and consequent liability for loss was an issue for the jury, and it was not error to refuse a preemptory instruction for defendant. W. F. Bogart & Co. v. Wade (Ark. 1918), 200 S. W. 148.

The evidence and issues submitted having no reference to any depreciation caused by an extraordinary run of cattle and the crowded conditions of the pens at destination, an instruction that the jury should not consider any damage resulting on account of an unusual run and such crowded conditions was properly refused. Panhandle & S. F. Ry. Co. v. Crawford (Tex. 1917), 198 S. W. 1079.

An instruction that "There is no evidence that the defendant in any way contributed to the cause of the dock fire," was properly refused, where the issue was as to defendant's liability as a carrier for loss of

if the train or trains in which cattle were being transported were roughly handled, by "ramming or jamming the cars together, knocking the cattle down and against each other, thereby injuring them," to find for the claimant such damages as resulted to the cattle therefrom. It was held it was clear, that the phraseology used by the court in submitting this issue to the jury was overdrawn and calculated to give the issue a significance in the mind of the jury to which it was not entitled under the evidence, since there is no evidence that the cars, or the "train or trains," in which the cattle were being conveyed were "rammed or jammed together," or that the cattle, or any of them, were knocked down or against each other by any such handling of the train or trains, or otherwise, as indicated in the charge. In such state of the evidence the use of the intense terms, "ramming," or "jamming" the cars together, and the language "knocking the cattle down and against each other, thereby injuring them," was improper and prejudicial to the carrier and required a reversal of the case as to it.[133] But a verdict will not be set aside on the ground that the damages awarded are excessive, where the amount is not such as to induce the court to believe that the jury acted from prejudice, partiality, or corruption.[134] A verdict in favor of a claimant suing for loss and damage to perishable produce that he recover from the railroad a specified amount less freight charges, is defective as a general verdict.[135] Where, after a judgment had been rendered for loss of freight in transit, the carrier finds the missing shipment in August, which had been made in December of the preceding

goods before delivery, and not as warehouseman. Lagomarsino v. Pacific Alaska Nav. Co. (Wash. 1918), 170 Pac. 368.

If what plaintiff would have realized from the sale of his apples damaged in transit was the proper measure of damages, no judgment could have been entered on the jury's answer to an issue as to what plaintiff would have realized, because the expense which should have been deducted from the amount was unknown. Quanah, A. & P. Ry. Co. v. Novit (Tex. 1918), 199 S. W. 496.

133. Texas & P. Ry. Co. v. White (Texas 1915), 174 S. W. 953, 955, 956.

134. L. S. & M. S. R. Co. y W. H. McIntyre Co. (Ind 1915), 108 N. E. 978, 983.

135. St. L., B. & M. Ry. Co. v. McClellan (Tex. 1915), 173 S. W. 258, 259.

year, the denial of a new trial is within the discretion of the court.[136] It has also been held the court must construe the proviso in the Twenty-eight Hour Law providing that, when the animals are carried in cars in which they can and do have opportunity to rest, the provisions as to unloading shall not apply, and it is error to submit the meaning of the proviso to the jury.[137]

13. **Costs.** Where a judgment was reformed and affirmed and appellees recovered a less amount than in the lower court, costs were adjudged against appellees.[138] Since costs may be very heavy after a case has been appealed, it is sometimes a matter of importance to determine just how the costs should be apportioned. In an action against several carriers under separate contracts for damages to a shipment of live stock, all the costs of the trial could not be charged against the defendant against whom judgment was had, in the event that other defendants were dismissed from the cause.[138½] Defendant railroad company was entitled to tax costs for its witnesses both per diem and mileage, though the witnesses were traveling on permits issued by the railroad, which cost the witnesses nothing.[138½a]

14. **Appeal.** The same principles govern the right of appeal, and the same questions can be raised on appeal in loss and damage cases, as in other suits. This readily appears from a review of the problems discussed in recent cases.[139] In an action

136. St. L., I. M. & S. Ry. (Ark. 1915), 176 S. W. 138, 139.

137. Northern Pac. Ry. Co. v. Finch, 225 Fed. Rep. 676.

138. Houston, E. & W. T. Ry. Co. v. Brackin (Tex. 1917), 191 S. W. 804.

138½. Ft. W. & D. C. Ry. Co. v. Allen (Tex. 1916), 189 S. W. 765.

138½a. Jeffcoat v. Atlantic Coast Line R. Co. (1918), 96 S. E. 616.

139. Where appellant failed to test the accuracy of a witness on certain matter, it could not complain on appeal of the answer made. St. L. S. W. Ry. Co. v. Miller & White (Tex. 1916), 190 S. W. 819, 820.

Where appellant submitted specific grounds embodied in a peremptory charge why it should be submitted to the jury, he cannot on appeal sustain the charge upon another and different ground not presented in the trial court. P. & S. F. Ry. Co. v. Vaughn (Tex. 1917), 191 S. W. 142.

An assignment of error complaining that the verdict is excessive, made for the bearing it would have upon the other assignments presented, rather than with any expectation if it stood alone, it would be

for loss or damages, if either party desires to appeal to the Supreme Court of the United States, it does not seem necessary to plead the federal right, but it is enough if it is relied upon

sustained in the form presented, will be overruled for the reason given therein. P. & S. F. Ry. Co. v. Morrison (Tex. 1917), 191 S. W. 138.

In an action for negligent carriage of cattle, error in the admission of evidence for plaintiffs of difference in the value of cattle when loaded and on their arrival was not sufficiently presented for review by the general objection that evidence "of any difference in value" between time of loading and of arrival would be incompetent to prove damage to the shipment. K. C. M. & O. Ry. Co. of Texas v. James (Tex. 1916), 190 S. W. 1136.

Parties will not be allowed to change front in this court and assert a theory which was not suggested in the court below. Buel, Pryor & Daniel v. St. Louis & S. F. Ry. Co. (Okla. 1917), 163 Pac. 536.

Where a suit is instituted in the justice court against two tort-feasors and a judgment rendered for plaintiff against one only, an appeal taken to the district court by the unsuccessful defendant does not operate to appeal said cause as to the successful defendant. M. K. & T. Ry. v. Chowning (Okla. 1917), 162 Pac. 1105.

Where defendant did not raise question in motion for new trial, that one item of recovery was not shown to be reasonable value of services, it cannot raise question on appeal. Osage Tie & Timber Co. v. Gorg-Murphy Timber & Grain Co. (Mo. 1917), 191 S. W. 1026.

While the court on writ of error will not reverse the trial court's findings of facts, when supported by evidence, a finding entirely unsupported by evidence will be considered erroneous in law. First Nat. Bk. v. G. R. & I. Ry. Co. (Mich. 1917), 161 N. W. 859.

The Supreme Court on writ of error to the Court of Appeals, though it can decide whether there was any evidence to sustain the judgment, cannot pass on the weight of the evidence as to which the decision of the Court of Civil Appeals is final. Gulf, C. & S. F. Ry. Co. v. Nelson (Tex. 1917), 192 S. W. 1056.

Where it does not appear that the case has been fully developed as to one issue, it should on reversal be remanded, and judgment should not be rendered in the court on appeal. Gulf, C. & S. F. Ry. Co. v. McKie (Tex. 1916), 191 S. W. 576.

Argument in the supplemental or reply brief on a point not presented on submission of the cause in the original brief is too late for consideration. Nashville, C. & St. L. Ry. v. Abrahamson-Boone Produce Co. (Ala. 1917), 74 So. 350, 351.

A holding that facts which were otherwise pertinent and controlling in a suit against a carrier for delay in the delivery of an interstate shipment, in which the carrier relied upon certain conditions in the interstate bill of lading as a defense, must be put out of view because a bill of lading in the hands of an innocent purchaser is in fact negotiable paper, giving greater rights to him than could be enjoyed by the

or by the one from whom he
quired the bill, amounts to a
ı of a Federal question which
ıtain a writ if error from the
. Supreme Court to a state
A. T. & S. F. R. Co. v.
, 36 Sup. Ct. 665, 667, 241 U.

leral question which will sus-
writ of error from the Fed-
ıpreme Court to a state court
volved in a decision of the
ourt that a so-called embargo
:h a railroad company, at the
of a paper company owning
:rating a private sidetrack, re-
o furnish cars to shippers for
te consignments to such paper
ıy which the latter, under con-
with the shippers, was under
gation to receive, and did in
:eive, violates the provision of
pburn act of June 29, 1906 re-
railway companies to pro-
nd furnish transportation to
s upon reasonable request
r, and that such embargo
be removed by the railway
ıy without notice to the paper
ıy, although such action pro-
ı congestion of cars beyond the
of the paper company to
on its sidetrack in the usual
.nd thus rendered the paper
ıy liable to demurrage
s. Menasha Paper Co. v. C. &
Ry. Co., 36 Sup. Ct. 501.
appeal to a federal circuit
›f appeals from a final decree
istrict court in a suit in ad-
brings the case before it for
de novo so that the court may
an interlocutory decree there-
:h was not appealed from, and
a recovery against a party
ras dismissed by that decree,
ıay review both interlocutory
and final decrees so far as essential to grant relief to a party who had not appealed from either decree. Reid v. Fargo, 36 Sup. Ct. 712.

The burden is on appellant to show probable injury as well as error. St. L. S. W. Ry. v. Miller & White (Tex. 1916), 190 S. W. 819.

Principles of law established on a former appeal, so far as applicable, remain the law of the case, and must be adhered to on any subsequent appeal, whether right or wrong. C. C. C. & St. L. Ry. Co. v. Blind (Ind. 1917), 117 N. E. 641.

An exception to the overruling of an objection to the introduction of evidence was essential for the preservation of ground for review. C. R. I. & P. Ry. Co. v. Burkholder & Tuggle (Ark. 1917), 195 S. W. 1073.

The exclusion of evidence is not reviewable, where the bill of exceptions does not show any objection to the ruling, but, on the contrary, contains a notation that there was no exception. Michellod v. Ore.-Wash. R. & Nav. Co. (Ore. 1917), 168 Pac. 620.

Where a plaintiff appeals from a direction of verdict for defendant, it is incumbent upon him to show that there were no grounds upon which verdict could properly be directed. Quillen v. Minneapolis & St. L. R. Co. (Ia. 1917), 164 N. W. 779.

The Supreme Court has no jurisdiction to review findings of fact in a law case, where the evidence is susceptible of more than one inference, but where only one inference is reasonably deducible, it must be determined by the court as a matter of law. Ragin v. N. W. R. Co. of S. C. (S. C. 1917), 93 S. E. 860.

It must be assumed on appeal that jury followed instructions relating to amount of recovery. St. Joseph

& G. I. Ry. Co. v. Des Moines Ry. Co. (Ia. 1917), 162 N. W. 812.

Questions not raised in the lower court will not be reviewed. Stoddard Lumber Co. v. Ore.-Wash. R. & Nav. (Ore. 1917), 165 Pac. 363.

A judgment of the highest court of a state, which, upon the ground of the validity of the stipulation in an interstate through bill of lading respecting the giving of notice of claims for damages, reversed in part a judgment in favor of the consignee in an action against the initial carrier to recover on such bill of lading for the negligence of connecting carriers as well as of itself, may be reviewed in the Federal Supreme Court on cross writ of error, where the consignee asserts that the provisions of the Interstate Commerce Act are violated by such stipulation. St. L., I. M. & S. R. R. Co. v. Starbird, 37 Sup. Ct. 462, 243 U. S. 592.

A right, the creation of a federal statute, was especially set up or claimed, and decided against, within the meaning of the Judicial Code, § 237, governing writs of error from the Federal Supreme Court to state courts, where the action was one against the initial carrier of an interstate shipment to recover upon a through bill of lading for the negligence of the connecting carriers, as well as of itself, and was brought since the passage of the Carmack Amendment by which Congress took entire possession of the subject of the rights and liabilities growing out of contracts for interstate shipments, and the defendant carrier, though not specifically mentioning the federal statute in its answer, did specifically plead a breach of the obligation under the bill of lading to report claims for damages to the terminal carrier in writing within thirty-six hours after the consignee had been notified of the arrival of the freight at the place of delivery, insisting that such obligation had not been complied with, and the state court, in deciding the case against the carrier, stated that a through bill of lading had been issued and would be controlling in the absence of special facts which it found as to the effect of verbal notice given to certain agents of the terminal carrier. St. L., I. M. & S. R. Co. v. Starbird, 37 Sup. Ct. 462, 243 U. S. 592.

It might not be amiss to point out it has recently been held that an objection to the constitutionality of a statute, not properly raised in the trial court by pleading, motion, demurrer, objection to testimony, or motion for new trial, will not be considered on appeal. St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co. (Ia. 1917), 162 N. W. 812.

We submit that this is not the weight of authority, the general rule being that the constitutionality of a statute may be raised at any time. Certainly if an action is brought under a statute that is unconstitutional, it would be an unusual rule of law to say that a party could waive such unconstitutionality. An unconstitutional statute is void and no act of a litigant can validate it.

In determining whether the trial court should have given a peremptory instruction for plaintiff, it is proper to view the case in accordance with defendants' pleadings and evidence. Craig, Thompson & Jeffries v. Barreda (Tex. 1917), 200 S. W. 868.

The Supreme Court cannot treat the rulings of the trial court in the admission and exclusion of testimony as prejudicial, even though

and in a proper manner called to the attention of the court.[139½] A verdict for a shipper of live stock will not be set aside by an appellate court if there was evidence upon which the jury could have predicated its verdict.[140] A reviewing court not having

they may have been erroneous, where the record does not show that a letter improperly admitted was read in evidence, or what the answers of a witness improperly excluded would have been. Bush v. Curry (Ark. 1917), 199 S. W. 375.

The correction of the judgment with respect to the amount of interest allowed would not prevent the taxing of the costs of appeal against appellant who failed to seek a correction in the trial court. San Antonio & A. P. Ry. Co. v. Sutherland (Tex. 1917), 199 S. W. 521.

The scope of review is defined by the "points" provided for in the rules, and not by the assignment of errors. McNamara v. Chicago, R. I. & P. Ry. Co. (Iowa 1918), 165 N. W. 1008.

In an action for damage to a shipment of cattle from delay in transit, in the absence of evidence to show that delivery of the cattle was accepted by the consignee on the cars at destination and that the stockyards company acted for the consignee in unloading, the Court of Civil Appeals cannot assume that the stockyards company in unloading was not performing one of the duties of transportation incumbent on the carriers. Panhandle & S. F. Ry. Co. v. Crawford (Tex. 1917), 198 S. W. 1079.

Where a transcript of all the evidence was sent up to the Supreme Court with the bill of exceptions, but was not formally made a part thereof, the court, on motion before argument, would allow an amendment of a certificate to the bill of exceptions as to attach all the evidence. United Brokers' Co. v. Southern Pac. Co. (Ore. 1917), 169 Pac. 114.

Where the statement under an assignment of error was unsatisfactory and failed to show that the finding of the court complained of was not supported by the statement of facts, the appellate court need not examine the statement of facts in order to determine that question. Wells Fargo & Co. v. Sprague (Tex. 1917), 199 S. W. 657.

139½. St. L., I. M. & S. R. R. Co. v. Starbird, 37 Sup. Ct. 462, 243 U. S. 592.

140. Houston v. T. C. R. Co. v. Lindsey (Tex. 1915), 175 S. W. 708, 711.

An appellate court cannot disturb a verdict on substantial conflicting evidence. Blair Horse & Mule Co. v. St. Joseph & C. I. Ry. Co. (Mo. 1915), 180 S. W. 412.

Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co. (Mo. 1916), 181 S. W. 1080.

The decision of the Court of Civil Appeals in a loss and damage case on appeal from the county court is final and a certificate to the Supreme Court does not lie, and, if the Supreme Court had jurisdiction by virtue of dissent, appellant was not deprived of the remedy by petition for writ of error. Chicago, R. I. & G. Ry. Co. v. Dalton (Tex. 1915), 177 S. W. 556.

Where the question raised by ap-

the evidence before it, cannot disturb a finding of negligence, especially when a fact appears from which an inference showing negligence can be drawn.[141] And on appeal from a nonsuit submitted to by plaintiffs at the close of their evidence to avoid a directed verdict against them, the Supreme Court must assume that all inferences that may be drawn from the evidence are established.[142] On appeal questions should not be raised inconsistent with the theory on which the case was originally tried, nor which are not fully presented in the record. Thus on appeal from judgment in an action for damages to a shipment of live stock, the case not having been tried below on the theory that the railroad had ratified the unauthorized act of its station agent in receiving oral notice of the injury, judgment for the claimant could not be affirmed on the ground that such ratification had taken place.[143] Where title is not questioned in the lower court, objection to lack of proof of title cannot be made upon appeal.[143½] In an action for damages for delay of a shipment of cattle a defense not pleaded or presented by the instructions cannot be raised on appeal.[144] Though on appeal defendant carrier relied on an alleged provision in the bill of lading, no effect can be given the provision where it did not appear in the abstract.[145] In an action for damages for failure to deliver a car of sugar which plaintiff had resold, a general objection to testimony by the general manager of claimant's business as to the

pellant was so well settled that there was no reasonable ground for the appeal, the court, affirming it, should assess 10 per cent damages. Texas & P. Ry. Co. v. Erwin (Tex. 1915), 180 S. W. 662.

In an action against a carrier for conversion, where the trial court found that both parties agreed that the carrier had the right to sell the goods at public auction unless an agreement had been entered into barring the right, an assignment of error that the carrier did not have such right will not be considered. Whitley v. Gulf & S. F. Ry. Co. (Texas 1916), 183 S. W. 36, 37.

141. Astrella v. Laffey (Mass. 1916), 111 N. E. 681.

142. A. E. Myers & Co. v. Norfolk Southern R. Co. (N. C. 1916), 88 S. E. 149.

143. McElvain v. St. Louis & S. F. R. Co. (Mo. 1915), 180 S. W. 1018.

143½. Yazoo & M. V. R. Co. v. Solomon (Ark. 1916), 184 S. W. 418.

144. Rissler v. Missouri Pac. Ry. Co. (Mo. 1916), 183 S. W. 676.

145. Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co. (Mo. 1916), 184 S. W. 915, 916.

sales, apparently on the ground that the sales were not made personally by the manager, will not support an assignment on appeal that the evidence was hearsay, that objection not being presented in any manner, as the motion for new trial merely declared that such evidence was incompetent, irrelevant, and immaterial.[146] An assignment of error, stating that "the judgment * * * is contrary to the law * * * and the evidence, * * *" being too general will not be considered.[147] An assignment, complaining of the overruling of an objection to the evidence, presents nothing for review, where the evidence was in part admissible.[148] An assignment of error to the exclusion of testimony, too vague to show what testimony was excluded cannot be considered on appeal.[149] In the absence of a motion to set aside the jury's findings, an assignment of error based on the insufficiency of the evidence to support them will not be considered.[150] Where one of two carriers, defendants

146. Ryley-Wilson Grocer Co. v. St. Louis & S. F. R. Co. (Mo. 1916), 184 S. W. 915.

Where the charge as a whole fairly presented the case, judgment will not be reversed on account of technical defects. Panhandle & S. F. Ry. Co. v. Jones (Tex. 1906), 182 S. W. 1.

In an action against a carrier of live stock for damages to certain shipments in transit, where, if the jury awarded to claimant his entire claim, the carrier's contract liability was exceeded only to the extent of $13.80 on 2 hogs and 2 cattle out of shipments aggregating about 150 head of stock, and where the verdict, in fact, instead of being for such entire claim for $889, was only for $500, the slight excess over the recovery permissible under the contract on a comparatively small portion of the shipment was not ground for reversal; since judgment will not be reversed for a trivial excess where the cost of another trial would exceed the reduction to which appellant is entitled. Cincinnati N. O. & T. P. Ry. Co. v. Smith & Johnston (Ky. 1915), 176 S. W. 1013, 1014.

147. Wardlow v. Andrews (Tex. 1915), 180 S. W. 1161.

148. Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas (Tex. 1916), 184 S. W. 1070.

149. Cleburne Peanut & P. Co. v. Missouri, K. & T. Ry. Co. of Texas (Tex. 1916), 184 S. W. 1070.

150. Texas & N. O. R. Co. v. Weems (Tex. 1916), 184 S. W. 1103.

Where there is a conflict between a bill of exceptions and statements of facts as to the proceedings at trial the statement controls. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916), 182 S. W. 361.

Where the verdict was general, and it appeared that, as to some of the claims of recovery, claimant was not entitled, it will be presumed on ap-

in an action for damages to a shipment of cattle, had an instructed verdict in its favor, and the other suffered judgment and alone appealed, the judgment, though reversed and remanded as to the appellant, would be affirmed as to such defendant.[151] Whether the arrival of an interstate shipment at destination, the payment of the freight by the consignee, his signature to a receipt for the shipment, and his removal of a part of the goods, leaving the rest, with the carrier's permission, to meet his convenience in removal, discharged the carrier's contract set forth in the bill of lading and created a new obligation as warehouseman, governed by the local law, which casts upon the warehouseman, in case of a loss by fire, the burden of showing that it was not negligent, is a federal question which will support the appellate jurisdiction of the Federal Supreme Court over a state court.[152] A judgment of the highest state court which affirms a judgment against a carrier because of a decline in market value, due to an unreasonable delay in the transportation of an interstate shipment, will not be reversed because the trial court, by its instructions, erroneously permitted the jury to award as damages the amount of such decline in value without reference to a limitation in the bill of lading and in the carrier's published tariff that the carrier's liability for loss or damage is to be computed on the basis of the value of shipment, plus the freight, at the time and place of shipment, unless a lower value is agreed upon, or because the trial court erroneously excluded such tariff with its conditions when offered in evidence, where, upon the

peal that no part of the recovery was on account of such claim. Southern Kansas Ry. Co. of Texas v. Hughey (Tex. 1916), 182 S. W. 361, 362.

151. San Antonio & A. P. Ry. Co. v. Shankle & Lane (Tex. 1916), 183 S. W. 115.

In an action against two railroad companies there was a judgment in favor of one, and the other appealed. There was no complaint as to the judgment in favor of the company which did not appeal nor was there any allegation of partnership or agency between the companies. Held that, though the judgment against the appealing railroad company was reversed, the judgment in favor of the other should not be disturbed. Pecos & N. T. Ry. Co. v. Holmes (Tex. 1915), 177 S. W. 505.

152. Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. Ed.—, 36 Sup. Ct. 469.

153. New York, P. & N. R. Co. v. Peninsula Produce Exch., 240 U. S. 34, 60 L. Ed.—, 36 Sup. Ct. 230.

facts as the highest court finds them to be, the agreed maximum of liability as stipulated is not exceeded by the judgment.[153] A federal question not raised in the trial court nor on appeal will not be considered by the Federal Supreme Court on writ of error to the highest state court.[154] The judgment of the highest state court ordering a bill and cross-bill to be dismissed for want of jurisdiction is conclusive upon the Federal Supreme Court on writ of error unless the denial of a federal right is involved.[155] A case which involves rights set up and denied that arose upon through interstate bills of lading issued under the Carmack Amendment is reviewable in the Federal Supreme Court on writ of error to a state court.[156]

154. Illinois C. R. Co. v. Mulberry Hill Coal Co., 238 U. S. 275, 59 L. 1306, 35 Sup. Ct. 760.

155. Dayton, C. & I. Co. v. Cincinnati, N. O. & T. P. R. Co., 239 U. S. 446, 60 L. Ed.—, 36 Sup. Ct. 137.

Where the question involved in an action for damages to an interstate shipment of live stock, defended on the ground of the shipper's failure to give the notice of injury required by the written contract of shipment, was a federal question of which the Supreme Court of the United States had final jurisdiction, a party, if the opinion of the Court of Civil Appeals was erroneous, had a plain, adequate, and complete remedy by due course of law, by proper application to the Supreme Court of the United States, so that it was not mandatory upon the Court of Civil Appeals to certify the case to the state Supreme Court. Chicago, R. I. & G. Ry. Co. v. Dalton (Tex. 1915), 177 S. W. 556.

In suit for damage to an interstate shipment of live stock it is the duty of the Court of Appeals to apply the law relative to a stipulation as to the time of suit as interpreted by the Supreme Court of the United States. Howard v. Chicago, R. I. & P. Ry. Co. (Mo. 1916), 184 S. W. 906.

156. C. C. & S. F. Ry. v. Texas Packing Co., 37 Sup. Ct. 487.

X.

SETTLEMENT OF CLAIMS BETWEEN CARRIERS.

Section 20 of the Interstate Commerce Act provides that a carrier which is compelled to pay a claim due to the fault of a connecting carrier may recover back such amount. The law reads as follows: "That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." In Hill Steamboat Line v. New York Central & H. R. R., 158 N. Y. S. 1084, the Hill Steamboat Line delivered a shipment to the Michigan Central which in turn delivered it to the New York Central for shipment by steamship to South America. The Steamboat Company never received the property and the initial carrier paid the claim. It then brought suit under the Carmack Amendment against the New York Central and connecting carriers to recover the amount of the claim which it had paid to the shipper. It seems that the New York Central was to turn the goods over to the Panama Company, which in turn was to deliver to the California-Atlantic Steamship Company. One Haring was the authorized truckman of the Panama Company. As between the New York Central and the Panama Company on one hand and Haring on the other, a definite course of dealing had grown up in handling "through" shipments. When a notice of arrival came the Panama Company would send it to Haring, who would rubber stamp it and give it to one of his men, who would go to the station, pay the charges, obtain a receipted freight bill and by reason of it get possession of the shipment. The receipted freight bill was used as evidence of the right to receive possession; the sole paper to be produced on the

delivery platform when "through-billed freight" destined to continue over the line of the Panama Company was to be taken from the possession of the New York Central. Some person, not in the employ of Haring, secured the receipted freight bill and obtained possession of the shipment and converted it to his own use. Who he was, was not known. It was claimed by the Panama Company that the New York Central did not deliver the goods in the proper manner, and that in any action involving the rights and liabilities of the carriers, between themselves, the New York Central was responsible for the claim. The court held that as between carriers, it was admissible to show their course of dealing, and that the Panama Company was liable for the loss. The court said (p. 1089): "To hold that, whenever loss occurs, the intermediate carrier, which has yielded possession only in the manner sanctioned by the usage long prevalent in its dealings with the connecting carrier, must nevertheless bear the loss, unless the intermediate carrier can affirmatively show in detail that its employees observed all the rules laid down by historic precedents governing delivery by carriers to purported owners or consignees, would be to ignore the obvious necessities of present-day transportation under through routing. Such adjustments and usages could not, of course, bar the owner's right, or the initial carrier's right, to reimbursement; but as to liability inter se both the carriers are bound. These two carriers had, as between themselves, made presentation of the receipted freight bill the sole and uniformly accepted evidence of right to receive possession on the delivery platform, and where question arises as to which must bear a loss sustained through fraud and theft, neither may be heard to reject the usage or maintain that the loss should not be borne by the carrier whose employee committed the theft of the goods or whose employee was guilty of the unexplained loss or conversion of the receipted bill which enabled some third person to commit the theft. If the conversion of the goods was not by a person in fact employed by Haring, at least it is true that one of Haring's employees either converted or lost the receipted bill which the familiar usage of the parties had made the sole symbol, evidence, or token of the right to receive possession, and then kept silent, during the day intervening, when information of the loss or theft

of the paper would have halted delivery. The Panama Company, through Haring, has failed to show that the latter's employee did not receive the goods and convert them, or that his employee did not give the receipted bill to some authorized person, or that Haring's employee did not part with its possession through sheer carelessness, and this failure is in the face of the fact that Haring and his employees are in far better position to adduce proof upon the subject."[1] In an action for contribution by an initial carrier for injury to an interstate shipment, the sole issue to be determined is whether the injury occurred while the goods were in possession of the terminal carrier.[2] In a suit by one carrier against another to recover the amount of judgment which it has been forced to pay a shipper for a loss for which it claims a connecting carrier is responsible, the judgment is not binding as between the carriers, and the right of the plaintiff carrier to recover depends upon showing that the injury to the shipment was sustained while in the possession and control of the defendant carrier.[3] Although the Intertsate Commerce Act does not require notice of shipper's suit against an initial carrier for injuries to an interstate shipment to be given connecting carriers, in order to permit recovery of reimbursement by the initial carrier, giving notice is proper practice.[4] By ad-

1. Under the Carmack Amendment to the Interstate Commerce Act, an initial carrier is responsible to the shipper for the entire damage occurring in transit over connecting lines, but is entitled to recoup itself for any part of the loss occurring upon the line of one of its connecting carriers. Southern Ry. Co. v. Avey (Ky. 1917), 191 S. W. 460.

2. St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co. (Ia. 1917), 162 N. W. 812.

In an action for reimbursement by the initial carrier against a terminal carrier for injuries to an interstate shipment, the record of proceedings and judgment in the shipper's action were admissible in view of the Interstate Commerce Act, making such judgment proper evidence, and the record being necessary to show the scope of the adjudication. St. Joseph & G. I. Ry. Co. v. Des Moines Ry. Co. (Ia. 1917), 162 N. W. 812.

3. St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co. (Ia. 1917), 162 N. W. 812, 815.

4. St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. (Ia. 1917), 162 N. W. 812.

Ordinarily, if a third person having notice of an action against defendant in which he is liable to defendant, ignores such notice, he

mitting the shipper's judgment against an initial carrier for injury to an interstate shipment in evidence in the carrier's action against the connecting carrier for reimbursement under the Act and directing a verdict, the court did not hold the shipper's judgment as conclusive against the connecting carrier.[5] Where the record in a shipper's action against an initial carrier for injuries to an interstate shipment showed that he recovered for rough handling of the car, and not because of the perishable nature of the shipment, in an action by the initial carrier for reimbursement against the terminal carrier, in whose possession the goods were injured, the latter question was not in issue.[6] Under the Interstate Commerce Act, providing that any person damaged by any common carrier subject thereto may bring suit for damages in any District or Circuit Court of the United States of competent jurisdiction, a federal District Court had jurisdiction of an action by one carrier against another, which had demanded and been paid a portion of the freight on interstate shipments to which it was not entitled under the tariffs filed with the Interstate Commerce Commission.[7] Where cattle were shipped over

will be held to indemnify defendant to extent of judgment rendered against the latter, on the ground of estoppel; the purpose of such rule being to avoid a multiplicity of suits. St. Joseph & G. I. Ry. Co. v. Des Moines Ry. Co. (Ia. 1917), 162 N. W. 812.

Act Cong. June 29, 1906, § 7, pars. 11, 12, amending Act Feb. 4, 1887, § 20, pars. 11, 12, making initial carriers liable for loss to interstate shipments, and allowing recovery of reimbursement by initial carrier from connecting carrier, makes initial carrier's recovery dependent on a showing of injury to the shipment while in connecting carrier's possession, and not upon the shipper's judgment against initial carrier, although the shipper's judgment is conclusive as to the amount of the carrier's reimbursement, thus making the initial carrier the representative of all connecting carriers. St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co. (Ia. 1917), 162 N. W. 812.

5. St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co. (Ia. 1917), 162 N. W. 812.

6. St. Joseph & G. I. Ry. Co. v. Des Moines Ry. Co. (Ia. 1917), 162 N. W. 812.

7. Mobile & O. R. Co. v. Washington & C. Ry. Co., 242 Fed. 531.

The words "required to pay," as used in the Carmack Amendment, authorizing recovery by the initial carrier against the connecting carrier of damages it may be required to pay the shipper for loss or injury occurring on the line of the

connecting interstate lines, if shipper recovered from the initial carrier for the whole loss, it could recoup against each company handling the shipment for any damages caused by it.[8] Where the official classification provided for two standard forms of bills of lading to be issued, one "Straight Bill of Lading," which was not required to be surrendered before delivery of goods, the other an "Order Bill of Lading," containing the provision "Consigned to order of ——," and required to be surrendered before delivery, a waybill issued by an initial carrier stating the consignee to be "order of" a person named, although other than the shipper, held sufficient to advise a connecting carrier that an order bill of lading was outstanding and to render it liable to the initial carrier against which judgment had been rendered for delivery without surrender of the bill.[9] Where the official classification provided for two standard forms of bills of lading to be issued, one "Straight Bill of Lading," which was not required to be surrendered before delivery of goods, the other "Order Bill of Lading," containing the provision "Consigned to order of——," and required to be surrendered before delivery, a waybill issued by an initial carrier stating the consignee to be "order of" a person named, although other than the shipper, held sufficient to advise a connecting carrier that an order bill of lading was outstanding and to render it liable to initial carrier against which judgment had been rendered for delivery without surrender of the bill.[10]

connecting carrier, mean asked to pay, or asked of right and by authority of law to pay and do not require as a condition precedent to recovery that it shall have actually paid a judgment recovered against it by the shipper. St. Louis & S. F. R. Co. v. First Nat. Bank of Elk City (Okla. 1917), 171 Pac. 467.

8. Texas & P. Ry. Co. v. West Bros. (Tex. 1918), 207 S. W. 918.

Where shipper of cattle suing initial, connecting, and terminal carriers elected to recover from terminal carrier, which sought judgment over against connecting carriers, but under the Carmack Amendment to Hepburn Act (U. S. Comp. St., §§ 8604a, 9604aa) and under the pleadings and evidence the terminal carrier could not have recovery over, it was not necessary to remand the cause as to connecting carrier on reversal of judgment for plaintiff against terminal carrier. Texas & P. Ry. Co. v. West Bros. (Tex. 1918), 207 S. W. 918.

9. Pere Marquette Ry. Co. v. Chicago & E. I. R. Co., 255 Fed. 40.

10. Pere Marquette Ry. Co. v. Chicago & E. I. R. Co., 255 Fed. 40.

Where cattle were shipped over connecting interstate lines, if shipper recovered from initial carrier for the whole loss, it could recoup against each company handling the shipment for any damages caused by it. Texas & P. Ry. Co. v. West Bros. (Tex. 1918). 207 S. W. 918.

Where shipper of cattle suing initial, connecting and terminal carriers elected to recover from terminal carrier, which sought judgment over against connecting carriers, but under the Carmack Amendment to the Hepburn Act (U. S. Comp. St. §§ 8604a, 8604aa) and under the pleadings and evidence the terminal carrier could not have recovery over, it was not necessary to remand the cause as to connecting carrier on reversal of judgment for plaintiff against terminal carrier. Texas & P. Ry. Co. v. West Bros. (Tex. 1918), 207 S. W. 918.

Under the Carmack Amendment a terminal carrier alone sued for its negligence in transporting cattle received from a connecting carrier could have no recovery over for any damages found against it. Texas & P. Ry. Co. v. West Bros. (Tex. 1918), 207 S. W. 918.

XI.

The Interstate Commerce Act places telegraph companies within the operation of such act to the complete exclusion of state laws.[1] Conditions in an interstate telegraph message limiting the company's liability are valid until the Interstate Commission otherwise declares, and cannot be interfered with by the state.[2] Suit by the recipient of a telegram against the telegraph company for damages occasioned by a mistake in transmission is based on the telegraph company's violation of its public duty to correctly transmit and deliver the message, and not on the contract between the sender and the telegraph company; such public duty the telegraph company owed the sendee, even though the sendee was not an immediate party to the contract, so that the sendee has a right of action based on violation of the public

1. W. U. Tel. Co. v. Smith (Ala. 1917), 75 So. 393.

The Interstate Commerce Act, whereby Congress, under its interstate commerce power, assumed control of telegraph companies operating between states, controls in an action for damages from delay in delivery of a telegram sent from Cincinnati, Ohio, to Kansas City, Mo. Jacobs v. W. U. Tel. Co. (Mo. 1917), 196 S. W. 31.

But it has been held that the Interstate Commerce Act, subjecting telegraph companies engaged in interstate business to the Interstate Commerce Act for certain purposes, does not supersede all state laws as to liability of telegraph companies for a negligent nondelivery of an interstate message and as to the right of such company to stipulate for exemption from such liability, since that object is not dealt with in the act, and it need not be assumed that it was the intention of Congress to exert its authority over the subject in the absence of its clear manifestation. W. U. Tele. Co. v. Bailey (Texas 1917), 196 S. W. 516.

So the same court held the stipulation of a telegraph company limiting its liability for damages for nondelivery of a message, whether caused by the negligence of its servants or otherwise, to $50, in the absence of payment of additional charge based on greater value, is void under the law of either Texas or Tennessee. W. U. Tele. Co. v. Bailey (Texas 1917), 196 S. W. 516.

2. W. U. Tele. Co. v. Smith (Ala. 1917), 75 So. 393.

duty.[3] In the sendee's action for a mistake in transmitting an unrepeated interstate telegram, plaintiff will not be denied reccovery of the amount paid for sending the message, the measure of the company's liability under its stipulation and federal law, merely because he did not ask for the specific amount; he having asked for the enforcement of the company's liability to him, and having secured more than he was entitled to.[4] An endorsement on the back of an interstate telegram limiting the company's liability to $50 for mistake or delay in transmission or delivery was effective to limit the company's liability to the sendee.[5] A stipulation in an interstate telegram that the liabili-

3. Poor v. Western Union Telegraph Co. (Mo. 1917), 196 S. W. 28.

4. Poor v. Western Union Telegraph Co. (Mo. 1917), 196 S. W. 28.

5. Jacobs v. W. U. Tele. Co. (Mo. 1917), 196 S. W. 31.

By repeated adjudications, it is now established that under the Interstate Commerce Act Congress has taken possession of the field of interstate commerce by telegraph, and it has been repeatedly held that under the provisions of that act the classification of messages into unrepeated and repeated telegrams, and the charging of different tolls for such messages, is permissible, and that the stipulation set forth above requiring the payment of an additional charge for the transmission of a repeated message is a valid and enforceable stipulation. See Kirsch v. Postal Telegraph-Cable Co., 100 Kan. 250, 164 Pac. 267; Poor v. Western Union Telegraph Co., 196 Mo. App. 557, 196 S. W. 28; Western Union Telegraph Co. v. Lee, 174 Ky. 210, 192 S. W. 70; Meadows v. Postal Telegraph-Cable Co., 91 S. E. 1009; Western Union Telegraph Co. v. Petteway (Ga. 1918), 94 S. E. 1032.

A telegraph company, which offered to the public its services in transporting money, brought itself into the status of a common carrier with respect to such business, so far as rules applicable to the relation might be applied. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

For dereliction in duty owing to the public by a common carrier, he is liable in tort to the person injured, though the tort originated in breach of contract, and actual and punitive damages may be awarded as circumstances warrant. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

The provision of the South Carolina Constitution that all telegraph companies engaged in transmitting intelligence for hire are common carriers is merely declaratory of the common law. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

Where a husband desired to wire money to his wife, and asked the telegraph agent as to the time it would take, and was told 30 minutes, the agent not informing him

ity of the telegraph company was limited to the amount received for sending the message was not a limitation of liability, but was a direct declaration of no liability, and hence ineffective to limit the company's liability for damages occasioned by its

that the money would have to be transmitted through a bank, while it was after banking hours, the telegraph company cannot set up as a defense to the action for delay necessity to transmit through the bank. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

In an action against a telegraph company for delay in transmitting money, instruction that recklessness might be presumed from unreasonable delay was not misleading; context showing that "presumed" was used in the sense of "inferred," and not to state an unyielding persumption of law. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

A ledger account for sending and receiving telegrams, made up from the telegrams themselves, and in which for the first time are entered the amount of the charges, held admissible as book of original entry, notwithstanding a counter blotter in which was made a partial record of telegrams. Early-Foster Co. v. MacKay Telegraph Co. (Texas, 1918), 204 S. W. 1172.

An agent, with limited authority to buy at a certain price, paying more, is liable to the principal for the excess expended. Western Union Telegraph Co., Chihuahua Exchange (Texas 1918), 206 S. W 364.

Punitive damages are not recoverable for the mere breach of a private contract, in the absence of circumstances creating a cause of action for fraud. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

Where a cable transfer is sold, the money paid the seller becomes his property at the time of the sale; the transaction being completed at that time, and the buyer receiving in consideration thereof the obligation of the seller to pay payee the equivalent in foreign money. Oshinsky v. Taylor, 172 N. Y. S. 231.

A cable transfer is a credit for a sum of money payable at the place indicated; the term "cable transfer" precluding the idea that an actual transfer of money is contemplated. Oshinsky v. Taylor, 172 N. Y. S. 231.

In an action against a telegraph company for actual and punitive damages for failure to transmit money promptly, the issue of punitive damages held for the jury under evidence as to conduct of the company's agents. Reaves v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 295.

Though the price at which an agent was authorized to sell was less in the telegram as transmitted than in the message filed, it is necessary, for recovery from the company, to prove that the value of the goods exceeded the amount realized from the agent's sale. Early-Foster Co. v. Telegraph Co. (Tex. 1918), 204 S. E. 1172.

Even if the claimant's telegram

was merely an approximate quotation of price, this is immaterial as regards his right to recovery from the telegraph company for transmitting a lower price, sendee ordering him to buy, and he doing so at the market price, resulting in a complete and fully executed contract. Western Union Telegraph Co. v. Chihuahua Exchange (Texas 1918), 206 S. W. 364.

One who telegraphs a quotation of price to another, with whom he has previously corresponded by mail, makes the telegraph company his agent, and so must settle with the sendee on the price erroneously transmitted, accepted by sendee, and can recover the loss from the company. Western Union Telegraph Co. v. Chihuahua Exchange (Texas 1918), 206 S. W. 364.

The proof in an action for transmitting telegrams being that the charges were the usual and customary rates, recovery must be regarded as had on a quantum meruit; and it is immaterial that the plaintiff, pleading that it was under the Interstate Commerce Commission's jurisdiction, and charges based on its order, but at trial waiving this contention, did not prove charges were based on the Commission's order and filed in its office. Early-Foster Co. v. MacKay Telegraph Co. (Texas 1918), 204 S. W. 1172.

A "repeated message," within the meaning of the restricted liability clause printed on the back of blank telegraph forms, is one telegraphed back to the sending office for comparison; the object not being to guard against delays, but against mistakes in transmission. Dettis v. Western Union Telegraph Co. (Minn. 1918), 170 N. W. 334.

A telegraph company is liable for all the damages which result proximately to the sender of an interstate message written upon a blank containing no restrictions upon its liability, where such message is accepted, but negligently delayed in transmission, provided such damages may reasonably be supposed to have been contemplated by the parties when the message was accepted as the probable result of such negligence. Dettis v. Western Union Telegraph Co. (Minn. 1918), 170 N. W. 334.

No discrimination in the rates charged for an interstate message arises from the fact that such message is written upon a telegraphic blank containing no restrictions upon the liability of the company for damages growing out of its negligent delay in transmitting such message, instead of the blank ordinarily supplied by the company for the use of its patrons in sending messages. Dettis v. Western Union Telegraph Co. (Minn. 1918), 170 N. W. 334.

Misspelling by the sender of a telegram of the name of the addressee, though resulting in delay in delivery, does not prevent recovery, if by exercise of ordinary care the company, after learning the correct name, could have delivered in time to prevent injury; it not being a proximate cause. Parham v. Western Union Telegraph Co. (Texas 1918), 206 S.W. 839.

Where the sender of a telegram telephoned the message and the telegraph agent, without the sender's knowledge, wrote it upon one of its forms, a verified reply denying the execution of a written con-

wrong.[6] In an action against a telegraph company for breach of a public duty in failing to properly deliver a telegram, the sendee may recover such damages as flow directly and in the usual course of things from the breach of the duty, though the damages were not within contemplation of the parties at the time of contracting.[7] A telegram addressed to an attorney and informing him of the date when two suits would be heard, and that

tract by the sender was not necessary. Western Union Telegraph Co. v. Armstrong (Texas 1918), 207 S. W. 592.

Notice of regulations is not to be imputed to the sender of an interstate message solely by reason of the fact that the company has voluntarily filed them with the Commission. Dettis v. Western Union Telegraph Co. (Minn. 1918), 170 N. W. 334.

Those who deal with telegraph corporations are entitled, if they insist upon it, to have their messages transmitted and delivered free from all conditions or limitations, except those imposed by the law of the land, and, when a surrender of any part of that right is claimed, the telegraph company must be able to establish a valid agreement to that effect. Western Union Telegraph Co. v. Armstrong (Texas 1918), 207 S. W. 592.

The Act of June 18, 1910, amending the Interstate Commerce Act so as to include telegraph companies as common carriers, did not extend to such companies inapplicable regulations designed to govern carriers of a different character. Western Union Telegraph Co. v. Merrow (Texas 1919), 208 S. W. 689.

If a telegraph company assumed the duty to transmit a telegram accepting, though not unconditionally, a contractual offer, and negligently failed to transmit and deliver to the party making the offer, the latter could recover damages proximately resulting from his failure to receive a qualified acceptance or counter proposition, providing he could show he would have consummated the contract on the terms of the telegram of acceptance. Western Union Telegraph Co. v. Fletcher (Texas 1919), 298 S. W. 748.

Answering a telegram expressing the willingness of a buyer of cattle to take heifer yearlings offered him held as not an acceptance of the seller's proposal to sell, not having been unconditional, so that no binding contract of sale resulted. Western Union Telegraph Co. v. Fletcher (Texas 1919), 208 S. W. 748.

Where the filing of a response to a telegram with a telegraph company made a binding contract, there could be no recovery against it for failure to transmit the response. Western Union Telegraph Co. v. Fletcher (Tex. 1919), 208 S. W. 748.

6. Jacobs v. W. U. Tele. Co. (Mo. 1917), 196 S. W. 31.

7. Jacobs v. W. U. Tele. Co. (Mo. 1917), 196 S. W. 31.

there would be a conference of attorneys interested, constituted sufficient notice to the telegraph company that a loss of a fee would be suffered by the addressee in case of delay in delivery of the telegram.[8] The liability of a telegraph company for errors in an interstate telegram must be determined in the light of federal statutes and decisions.[9] Wide effect is given to provisions in the contract by which an interstate telegram is transmitted.[10] An addressee in an interstate telegram is bound by the terms of the contract of transmission between the company and the sender.[11] A telegraph company is not estopped to set up a condition in the contract of transmission of a telegram that notice of claim for damages be filed within 60 days, because after the expiration of such time an agent told claimant to file his claim.[12] That an agent of a telegraph company, after the time allowed for filing claims for damages, told the addressee to put in a claim was not a waiver of a condition that notice of claims must be filed within such time.[13] Though the sending and delivery points of a telegraph message were within the same state, if part of the route of transmission was through another state, the message was interstate, although, had the wires within the state not been down, the message could have been sent alto-

8. Jacobs v. W. U. Tele. Co. (Mo. 1917), 196 S. W. 31.

9. Kerns v. Western Union Telegraph Co. (Mo. 1917), 198 S. W. 1132.

A contract for sending a telegram from one state to another is one involving "interstate commerce," and so governed by the federal law, not allowing damages for mental anguish. Hall v. West. Union (S. C. 1918), 94 S. E. 870.

Notwithstanding a mistake in the initials of the addressee, it is the telegraph company's duty to use ordinary care to make seasonable delivery of the message, and negligence in the discharge thereof is actionable.

10. Kerns v. Western Union Telegraph Co. (Mo. 1917), 198 S. W. 1132.

11. Kerns v. Western Union Telegraph Co. (Mo. 1917), 198 S. W. 1132.

12. Kerns v. Western Union Telegraph Co. (Mo. 1917), 198 S. W. 1132.

13. Kerns v. Western Union Telegraph Co. (Mo. 1917), 198 S. W. 1132.

Inasmuch as the Interstate Commerce Act requires that telegraph rates be uniform, it would seem that such companies cannot waive a condition in an interstate telegram that claims for damages be filed in 60 days.

gether within the state.[14] Where plaintiff's representatives wired him to come to another town, where he could buy a stock of goods for less than its value, he was only entitled to nominal damages for nondelivery of the telegram; the loss of the opportunity to make a contract being too speculative to be recoverable.[15] As between sender and sendee of a contractual offer, a telegraph company is the agent of the sender, who is bound contractually to the sendee by any mistake made in transmission of the message, though the sendee, under proper circumstances, may maintain an action against the telegraph company for damages resulting from violation of the public duty which it owes, as a carrier, to the sendee as well as to the sender.[16] It is the duty of one suffering damage by reason of the negligence of a telegraph company in transmitting a message to adopt every available method of minimizing the damage, but a party is not required to break his own contract, the misake in the transmission of the message having consisted in misstating the offered price of a commodity, in order to protect the telegraph company from the consequences of the negligence of its own servants.[17] Failure of a defendant telegraph company to transmit money within a reasonable time to a small town at which it had no money order office is not established by evidence that a bank at such town, to which the defendant sent the money, notified the sendee by mail, according to the usual method, the defendant having no knowledge of circumstances requiring more hasty dispatch of the money.[18] There is no obligation on part of a telegraph company to establish a money order office at a certain point, particularly where the town is small and the receipts are insufficient to enable the company to make money order payments.[19] Where the shipper of apples drew on the consignee

14. Davis v. Western Union Telegraph Co. (Mo. 1918), 202 S. W. 292.

15. Western Union Telegraph Co. v. Caldwell (Ark. 1918), 202 S. W. 232.

16. Des Arc Oil Mill v. Western Union Telegraph Co. (Ark. 1918), 201 S. W. 273.

17. Des Arc Oil Mill v. Western Union Telegraph Co. (Ark. 1918), 201 S. W. 273.

18. Lehue v. Western Union Telegraph Co. (N. C. 1918), 96 S. E. 29.

19. Lehue v. Western Union Telegraph Co. (N. C. 1918), 96 S. E. 29.

for $2 a box and, after the consignee's refusal to accept and its offer of $1.75 a box, sent a telegram to the bank holding the draft to accept $1.80 a box, which message, by the negligent mistake of the telegraph company, was made to read $1.08 a box, the telegraph company was liable to the shipper for the difference between the price of $1.08 received by him on the completed sale when the consignee received the altered message and the $1.80 a box which was the fair market value of the apples.[20] By mistake, a telegraph company delivered the quotation of a carload of steers as $2.75 a hundred pounds instead of $5.75 a hundred pounds. The addressee directed the steers to be shipped and upon receipt paid $2.75 a hundred pounds, refusing to pay anything additional. The addressee requested the agent of the telegraph company to verify the quotation, and the agent stated that he had done this. Held, that the sender of the telegram could recover the difference between $2.75 and the original quotation price in spite of the limitation in the original telegram, since the claimant demanded a verification, which took the telegram out of the unrepeated class.[21] Though the price at which an

Where the delivery of money transmitted by telegraph company is delayed because company had no money order office at place of destination, the company is not liable for such delay, where money was sent with express understanding that it would have to be paid through a bank, and company expressly stipulated that it would not be liable for the negligence of such bank. Lehue v. Western Union Telegraph Co. (N. C. 1918), 96 S. E. 29.

A stipulation by a telegraph company that it would not be liable for the negligence of a bank which was to pay money over the telegraph company forwarded to it, and where it maintained no office, is not contrary to public policy as a restriction of its liability for negligence. Lehue v. Western Union Telegraph Co. (N. C. 1918), 96 S. E. 29.

20. Bentley v. Western Union Telegraph Co. (Wash. 1918), 172 Pac. 1172.

The telegraph company, by procuring the consignee of the apples to make, and the consignee by making, an ex post facto offer to pay $1.50 a box for the apples, could not deprive the shipper of any part of his actual damages. Bentley v. Western Union Telegraph Co. (Wash. 1918), 172 Pac. 1172.

21. Western Union Telegraph Co. v. Piper (Tex. 1917), 191 S. W. 817.

In an action against a carrier for loss of a contract for the sale of goods due to their being delivered in a damaged condition, it was

agent was authorized to sell was less in the telegram as transmitted than in message filed, it is necessary, for recovery from the company, to prove the value of goods exceeded the amount realized from agent's sale.[21a] Even if claimant's telegram was merely an approximate quotation of price, this is immaterial as regards his right to recovery of telegraph company for transmitting a lower price, sendee ordering him to buy, and he doing so at the market price, resulting in a complete and fully executed contract.[21b] One who telegraphs quotation of price to another, with whom he had previously corresponded by mail, makes the telegraph company his agent, and so must settle with the sendee on the price erroneously transmitted, accepted by sendee, and can recover the loss of the company.[21c] The proof in an action for transmitting telegrams being that the charges were the usual and customary rates, recovery must be regarded as had on a quantum meruit; and it is immaterial that the plaintiff, pleading it was under Interstate Commerce Commission's jurisdiction, and charges based on its order, but at trial waiving this contention, did not prove charges were based on Commission's order and filed in office.[21d] In the federal courts a tele-

improper to permit plaintiff to reproduce statements made to him by the prospective purchaser regarding the damaged condition of the goods, or conversations other than those essential to show the consummation of the contract of sale and the purchaser's rejection of the goods after delivery at destination. Houston, E. & W. T. Ry. Co. v. Brackin (Tex. 1917), 191 S. W. 804.

21a. Early-Foster Co. v. Telegraph Co. (Tex. 1918), 204 S. E. 1172.

21b. Western Union Telegraph Co. v. Chihuahua Exchange (Tex. 1918), 206 S. W. 364.

21c. Western Union Telegraph Co. v. Chihuahua Exchange (Tex. 1918), 206 S. W. 364.

21d. Early-Foster Co. v. MacKay Telegraph Co. (Tex. 1918), 204 S. W. 1172.

The Act of June 18, 1910, amending the Interstate Commerce Act, so as to include telegraph companies as common carriers, did not extend to such companies inapplicable regulations designed to govern carriers of different character. Western Union Telegraph Co. v. Marrow (Tex. 1919), 208 S. W. 689.

If a telegraph company assumed the duty to transmit a telegram accepting, though not unconditionally, a contractual offer, and negligently failed to transmit and deliver to party making the offer, the latter could recover any damages proximately resulting from his failure to receive qualified acceptance or counter proposition, providing he could show he would have consummated

graph company is not liable for the willfulness of its servant in failing to deliver a telegram, unless it had knowledge before the event or afterward ratified the wrongful act.[22] The federal law does not recognize mental anguish as an element of damages in actions against telegraph companies for failure to deliver messages.[23] Where a reporter had an exclusive contract with a paper to transmit bowling scores and an agent for the telegraph

contract on terms of telegram of acceptance. Western Union Telegraph Co. v. Fletcher (Tex. 1919), 208 S. W. 748.

Answering a telegram expressing the willingness of a buyer of cattle to take heifer yearlings offered him held not an acceptance of the seller's proposal to sell, not having been unconditional, so that no binding contract of sale resulted. Western Union Telegraph Co. v. Fletcher (Tex. 1919), 208 S. W. 748.

Where the filing of a response to a telegram with a telegraph company made a binding contract, there could be no recovery against it for failure to transmit the response. Western Union Telegraph Co. v. Fletcher (Tex. 1919), 208 S. W. 748.

22. Berg v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 248.

23. Berg v. Western Union Telegraph Co. (S. C. 1918), 96 S. E. 248.

A telegram delivered to a telegraph company in Indiana for delivery to the sendee in Arkansas over the telegraph company's line and the telegraph line of a connecting railroad was an interstate message, and remained so until it was delivered to the sendee, and his suit to recover for mental anguish caused by failure to deliver the message after it was received at the place of delivery, as authorized by Kirby's Dig., § 7917, was not maintainable. La Cost v. Chicago R. I. & P. Ry. Co. (Ark. 1918), S. W. 586.

In an action against a telegraph company either for tort or for breach of contract to transmit money within reasonable time, plaintiff cannot recover damages for mental anguish, where the death of her mother causing such anguish was not known, and hence not within contemplation of parties at time the contract was entered into. Lehue v. Western Union Telegraph Co. (N. C. 1918), 96 S. E. 29.

A telegraph company is not liable for failure to deliver to plaintiff a message which by mistake of a doctor was directed to plaintiff when meant for his brother.. Smith v. Western Union Telegraph Co. (S. C. 1918), 95 S. E. 335.

In applying the laws of another state as to recovery for mental anguish in case of negligence in delivery of a telegraph message, sent from that state to Texas, and following the rule that the law of the state from which the message is sent must govern as to damages, a decision of the Supreme Court of Texas that Congress has not, as to interstate messages, superseded state laws authorizing recov-

company selected by the newspaper took a copy and sent it to another paper, the reporter cannot recover as damages the value of such news from the telegraph company, because he has no property interest in it after turning it over to the agent.[24] A telegraph company is not liable for punitive damages for a willful act of an agent in divulging a message, unless it authorizes or ratifies the act.[25] That a telegraph company did not discharge

ery for mental anguish, directly conflicting with a decision of the Supreme Court of such other state, will be followed, and recovery for mental anguish allowed. Western Union Telegraph Co. v. Brown (Tex. 1918), 202 S. W. 1049.

Where one received an unrepeated interstate telegram which was sent subject to the stipulation on the back of the message that the company should not be liable for a mistake in transmission of any unrepeated message beyond the amount charged for sending the same, the sendee for such a mistake could recover only the amount paid for sending the message. Poor v. Western Union Telegraph Co. (Mo. 1917), 196 S. W. 28.

In an action for damages from delay in delivering an interstate telegram, it will be presumed, if it be held that the Interstate Commerce Act requiring common carriers to print and file schedules of rates with the Interstate Commerce Commission, applies to telegraph companies, that such schedules were duly filed, and the burden is on the claimant to show the contrary. Jacobs v. Western Union Telegraph Co. (Mo. 1917), 196 S. W. 31.

It has been held, however, that the measure of damages recoverable for breach of a contract for the nondelivery of an interstate telegraph message is governed by the law of the state from which the message is sent. Western Union Telegraph Co. v. Bailey (Tex. 1917), 196 S. W. 516.

An indorsement on the back of an interstate telegram purporting to limit the telegraph company's liability for delay in delivering an unrepeated telegram to the price of sending was ineffective to limit liability for delay in delivering a telegram, where the delay was due merely to carelessness of the company in making delivery and there was no error in transmission which could have been cured by repeating the transmission. Jacobs v. Western Union Telegraph Co. (Mo. 1917), 196 S. W. 31.

24. Marlatt v. Western Union Telegraph Co. (Wis. 1918), 167 N. W. 263.

St. 1915, § 1778, subd. 5, fixing penalty for failure or negligence in transmitting messages, does not apply to a case where agent sends a copy of a news message to a competent paper. Marlatt v. Western Union Telegraph Co. (Wis. 1918), 167 N. W. 263.

25. Marlatt v. Western Union Telegraph Co. (Wis. 1918), 167 N. W. 263.

an agent who divulged a news message is not conclusive that it ratified the act so as to be liable for punitive damages, especially where the injured party said he did not want the agent discharged.[26] If an agent failed to inform the sender of a message that wires were down, as required by the state law, the telegraph company should be estopped in an action for delay in delivery to set up the fact that a severe storm had torn down its wires.[27] A state has power to legislate with respect to intrastate messages.[28] In actions against telgraph companies much the same questions of pleadings arise as in other cases.[29]

26. Marlatt v. Western Union Telegraph Co. (Wis. 1918), 167 N. W. 263.

Where agent of telegraph company divulged a news message, and the company denounced the act and offered to discharge the guilty employe, it cannot be said to have ratified the act so as to be liable for punitive damages. Marlatt v. Western Union Telegraph Co. (Wis. 1918), 167 N. W. 263.

27. Davis v. Western Union Telegraph Co. (Mo. 1918), 202 S. W. 292.

Where complainant wired a post office to forward his mail, and the telegraph company changed the name signed to the telegram, which caused a slight delay in the forwarding of the letter, but the evidence did not show that any damage was caused complainant as the result of this, telegraph company cannot be held liable for damages. Fulmer v. Western Union Telegraph Co. (S. C. 1918), 95 S. E. 179.

28. Vernon's Sayles' Ann. Civ. St. § 1914, art. 5714, requiring stipulation as to notice of claim for damages to be reasonable and making stipulations fixing the time at less than 90 days void, does not make invalid a stipulation in a contract to transmit a telegram requiring notice of claim for damages to be presented within 95 days after the cause of action arises, if such a stipulation is reasonable. Western Union Telegraph Co. v. Verhalen (Tex. 1918), 204 S. W. 240.

Under Const. U. S. art. 1, § 10, providing that no state shall pass any law impairing the obligation of contracts, where a telegraph company, in consideration of a grant of right of way for its line over plaintiff's land, agreed to furnish telegraph privileges to the amount of $1,500, the state Public Utilities Act, passed thereafter, prohibiting telegraph companies from issuing franks for any consideration except cash, had no effect on the obligation of the telegraph company to furnish franks for intrastate messages. Irvine v. Postal Telegraph-Cable Co. (Cal. 1918), 173 Pac. 487.

Where plaintiffs sought to recover penalty under Rev. St. 1909, § 3330, for failure to promptly deliver message, and defendant set up damage to its lines by storm, it was not setting up a new cause

of action for plaintiffs in reply to deny that they were informed that the wires were down, although under § 3332 failure to give such information also entitled plaintiffs to recover a penalty. Davis v. Western Union Telegraph Co. (Mo. 1918), 202 S. W. 292.

29. In an action against a telegraph company for failing to deliver a message, it was error to refuse to submit a charge asking a verdict for defendant on a finding that a stipulation in the contract whereby notice of damages was to be given within 95 days was reasonable, there being no evidence of its reasonableness, and it being undisputed that no claim was presented within such time, or that the stipulation had been waived. Western Union Telegraph Co. v. Verhalen (Tex. 1918), 204 S. W. 240.

In an action against a telegraph company for failing to deliver a message, where a plea alleging that notice of claim of damages had not been given within 95 days as required by contract was stricken, judgment for defendant could not be entered on appeal on the ground that the undisputed evidence showed that the stipulation as to notice was reasonable. Vernon's Sayles' Ann. Civ. St. 1914, art. 5714, providing that notice shall be presumed unless the want of notice is especially pleaded under oath, and there being no pleading under oath after the defense was stricken. Western Union Telegraph Co. v. Verhalen (Tex. 1918), 204 S. W. 240.

A railroad company, engaged in the business of transmitting messages by telegraph in the State of Arkansas, will be presumed to have complied with Kirby's Dig., § 7949, providing that any railroad company operating in the state by filing its assent in the office of the secretary of state may do a telephone or telegraph business. La Cost v. Chicago, R. I. & P. Ry. Co. (Ark. 1918), 203 S. W. 586.

XII.

FRAUDULENT CLAIMS.

In General. It is a criminal offense under the Interstate Commerce Act for a shipper to present a fraudulent claim against a railroad.[1]

1. Where it was asserted that a claim against a railroad company was fraudulent and that the pressing of the claim was a violation of the Interstate Commerce Act, as amended, the acts and sayings of one prosecuting or pressing the claim are generally admissible on the question of intent, and he may also testify as to his intention. Laser Grain Co. v. United States, 250 Fed. 826.

APPENDIX

THE TWENTY-EIGHT HOUR LAW

An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory, or the District of Columbia into or through another State or Territory or the District of Columbia and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes. Approved June 29, 1906. 34 Stat. L. 607.

Animals—Time Limit Confinement on Cars, etc. That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia, into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written consent of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement the time consumed in loading and unloading shall not be considered, but the time during which the

animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep, the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

Feeding at Expense of Owner—Lien. Sec. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

Penalty. Sec. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided,* That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space and opportunity to rest the provisions in regard to their being unloaded shall not apply.

Prosecutions. Sec. 4. That the penalty created by the pre-

ceding section shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this Act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

Repeal. Sec. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby repealed.

THE CUMMINS AMENDMENT AS AMENDED AUG. 9, 1916.

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in

any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void.

Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of Section 10 of this Act to Regulate Commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.

Provided, further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law; *Provided, further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage,

or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

FEDERAL BILL OF LADING ACT.

(Public—No. 239—64th Congress.)

(S. 19.)

An Act Relating to bills of lading in interstate and foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this Act.

Sec. 2. That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Sec. 3. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper.

Sec. 4. That order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however,* That nothing contained in this section shall be interpreted or construed to forbid the issuing of

order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

Sec. 5. That when more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however,* That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

Sec. 6. That a straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Sec. 7. That the insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 8. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

Sec. 9. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Sec. 10. That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Sec. 11. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Sec. 12. That except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods had been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 13. That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Sec. 14. That where an order bill has been lost, stolen, or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and

counsel fees: *Provided,* a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 15. That a bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Sec. 16. That no title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Sec. 17. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Sec. 18. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 19. That except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

Sec. 20. That when the goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of

like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 22. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

Sec. 23. That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Sec. 24. That a creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Sec. 25. That if an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they

e allowed by law and the contract between the consignor and e carrier.

Sec. 26. That after goods have been lawfully sold to satisfy a rrier's lien, or because they have not been claimed, or because ey are perishable or hazardous, the carrier shall not thereafter be ble for failure to deliver the goods themselves to the consignee owner of the goods, or to a holder of the bill given for the goods ıen they were shipped, even if such bill be an order bill.

Sec. 27. That an order bill may be negotiated by delivery ıere, by the terms of the bill, the carrier undertakes to deliver e goods to the order of a specified person, and such person or a bsequent indorsee of the bill has indorsed it in blank.

Sec. 28. That an order bill may be negotiated by the indorse-ent of the person to whose order the goods are deliverable by the ıor of the bill. Such indorsement may be in blank or to a speci-d person. If indorsed to a specified person, it may be negotiated ain by the indorsement of such person in blank or to another ecified person. Subsequent negotiation may be made in like ınner.

Sec. 29. That a bill may be transferred by the holder by livery, accompanied with an agreement, express or implied, to ınsfer the title to the bill or to the goods represented thereby. A ·aight bill cannot be negotiated free from existing equities, and e indorsement of such a bill gives the transferee no additional ght.

Sec. 30. That an order bill may be negotiated by any person possession of the same, however such possession may have been quired, if by the terms of the bill the carrier undertakes to deliver e goods to the order of such person, or if at the time of negotia-ın the bill is in such form that it may be negotiated by delivery.

Sec. 31. That a person to whom an order bill has been duly gotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill him had or had ability to convey to a purchaser in good faith for lue, and also such title to the goods as the consignee and con-gnor had or had power to convey to a purchaser in good faith r value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 32. That a person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

Sec. 33. That where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 34. That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;
(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

Sec. 35. That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 36. That a mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Sec. 37. That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Sec. 38. That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Sec. 39. That where an order bill has been issued for goods

no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Sec. 40. That, except as provided in section thirty-nine, nothing in this Act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Sec. 41. That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5,000, or both.

Sec. 42. First. That in this Act, unless the context of subject-matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this Act.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Person" includes a corporation or partnership, or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"State" includes any Territory, District, insular possession, or isthmian possession.

Sec. 43. That the provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 44. That the provisions and each part thereof and the sections and each part thereof of this Act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.

Sec. 45. That this Act shall take effect and be in force on and after the first day of January next after its passage.

Approved August 29, 1916.

FEDERAL CONTROL ACT.

(Public—No. 107—65th Congress.)

(S. 3752.)

An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

Sec. 8. That the President may execute any of the powers herein and heretofore granted him with relation to federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and cooperation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

Sec. 9. That the provisions of the Act entitled "An Act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act; and the President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this Act shall also apply to any carriers to which federal control may be hereafter extended.

Sec. 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any

other Act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any Act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control

That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission, shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the Act to Regulate Commerce as amended, and said findings and orders shall be enforced as provided

in said Act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice, shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Sec. 13. That all pending cases in the courts of the United States affecting railroads or other transportation systems brought under the Act to Regulate Commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so called, or under the Act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper.

Sec. 14. That the federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: ***Provided, however,*** That the President may, prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under federal control at any time he shall deem such action needful or desirable. No right to compensation shall

accrue to such owners from and after the date of relinquishment for the property so relinquished.

Sec. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Sec. 16. That this Act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

Approved March 21, 1918.

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